Supreme Court, U.S.
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No. 08-725

In The
Supreme Court of the United States

MARCIA B. NANCE,
Petitioner,

v.

THE GOODYEAR TIRE & RUBBER COMPANY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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November 12, 2008

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QUESTIONS PRESENTED

1. Did the Sixth Circuit err in applying Alexander v. Gardner-Denver Co, 415 U.S. 36 (1974), to admit a prior arbitration decision to resolve any ambiguities with regard to Petitioner's ADA, constructive discharge, FMLA, and other claims on the grounds that it is inadmissible hearsay and creates a conflict with the Ninth Circuit?

2. Did the Sixth Circuit err in using an arbitration decision under a Collective Bargaining Agreement to resolve ambiguities of fact on a de novo review under the Petitioner's ADA, constructive discharge, FMLA, and other claims?

3. Did the Sixth Circuit err in holding that Petitioner was not constructively discharged where she was disabled, and was placed in a dangerous workplace condition in front of a vat of boiling oil without a safety gate or adequate lighting for over four days, contrary to the decisions of other Circuits?

4. Should the work hours awarded by the state court for Nance's worker's compensation award be included in the 1250 hour calculation under 29 USC 2611 (2)(a)("FMLA")?

LIST OF PARTIES

The parties are listed in the caption.

CORPORATE DISCLOSURE STATEMENT

The Petitioner is not a subsidiary or an affiliate of a publicly-owned corporation.

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OPINIONS BELOW

The initial opinion of the United States Court of Appeals for the Sixth Circuit is reported at *Nance v. Goodyear Tire & Rubber Company,* 527 F. 3d 539 (6th Cir. 2008). The Sixth Circuit affirmed the decision of the United States District Court for the Western District of Tennessee and the decision is unreported.

STATEMENT OF JURISDICTION

The District Court's jurisdiction was invoked under 28 U.S. C. 1343 and 28 U.S.C. 1331.

The Sixth Circuit's opinion was rendered on May 23, 2008. The Petition for Rehearing was denied on August 14, 2008.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fed. R. Evid. 801

American with Disabilities Act, 42 U.S.C. 12101, et. seq.

Family Medical Leave Act, 29 U.S.C. 2601 et.seq.

Tenn. Code Ann. 50-6-102.

STATEMENT OF THE CASE

On appeal to the Sixth Circuit, the Appellant Marcia Nance ("Nance") argued that the district court erred in granting Goodyear's Motion for Summary Judgment in that (1) she has statutorily protected

rights under the ADA, FMLA, and other laws which cannot be barred by arbitration because there was no waiver; (2) she made a prima facie case on her federal and state disability claims; (3) she qualified for FMLA; (4) she was constructively discharged in retaliation for asking for reasonable accommodations and submitting a workers' compensation claim; (5) the Appellee Goodyear Tire & Rubber's ("Goodyear") conduct was outrageous and breached the duty of good faith and fair dealing. (Opinion, pg. 1).

The Sixth Circuit panel agreed with Nance that the district court incorrectly concluded that she was precluded from bringing her ADA and related claims in federal court where an arbitrator had ruled that she had voluntarily resigned under the company's CBA for allegedly not reporting off while on a medical leave of absence. (Opinion pgs. 5-10). The Sixth Circuit panel, however, held that summary judgment was still appropriate on the merits, but erred in applying Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), to admit a prior arbitration decision to resolve ambiguities with regard to her ADA, constructive discharge, FMLA, and other claims where it is inadmissible hearsay, and because the applicable federal statutes require de novo review independent of the arbitration proceedings. Therefore, the decision of the arbitrator in this matter should not be given any weight in determining whether Goodyear has met its heavy burden of proving that there are no genuine issues of material fact. (Opinion, pg. 5).

The Sixth Circuit further erred in holding that Nance had resigned without notice where she did not report off for over seven days while on an approved medical leave of absence. It further erred in holding

that Nance was not constructively discharged where she was disabled, and was placed in a dangerous workplace condition in front of a vat of boiling oil without a safety gate or adequate lighting for over four days.

The Sixth Circuit also erred in holding that the hours awarded by the state court for Nance's worker's compensation award were not to be included in the 1250 hour calculation under the Family and Medical Leave Act.

REASONS FOR ALLOWANCE OF THE WRIT

I. The Sixth Circuit's Decision is erroneous in applying Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), to admit a prior arbitration decision to resolve ambiguities with regard to Petitioner's ADA, constructive discharge, FMLA, and other claims on the grounds that it is inadmissible hearsay, and creates a Conflict with the Ninth Circuit.

As succinctly set forth in the concurrence of Judge Batchelder, the arbitrator's decision is inadmissible hearsay. The concurrence states:

> To be sure, Alexander, 415 U.S. at 60, said "[t]he arbitral decision may be admitted as evidence and accorded such weight as the court deems appropriate, but Alexander- decided February 19, 1974- predated the enactment of the Federal Rules of Evidence, and the Alexander Court was not confronted with present-day hearsay concerns. I realize that, in

other post-Alexander scenarios, courts have admitted arbitrators' rulings as hearsay exceptions, pursuant to public records exception, Fed. R. Evid 803(8), or the residual exception Fed. R. Evid. 807.

In such cases, the parties argued the admissibility of the particular arbitrator's decision and the district court rendered a decision pursuant to those arguments. I believe this to be the proper approach. But, here, the lead opinion disregards the hearsay aspect of the arbitrator's opinion and renders a decision that could be read in either of two ways: (1) an arbitrator's opinion is per se admissible, despite its hearsay character or questions of reliability or relevance; or (2) the admissibility of an arbitrator's opinion is to be determined by the factors set forth in Alexander, 415 U.S. at 60, regardless of its hearsay character. I find either of these objectionable.

"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Fed. R. Evid. 801. If we are to treat the arbitrator's decision as merely evidence, then that decision is almost certainly hearsay-i.e. the arbitrator's decision is a statement made by a declarant (i.e. arbitrator) who is not presently testifying, offered into evidence to prove the truth of the matter asserted (i.e. arbitrator's opinion on the matter). And, trial courts do not render sua sponte decisions on the admissibility of hearsay

evidence; that is for the parties to raise and argue, which was never done in this case.

Finally, the lead opinion's suggestion in its footnote three that the Supreme Court "approved of this approach" in McDonald v. City of West Branch, 466 U.S. 284, is seriously inaccurate. In a footnote thirteen to McDonald, the Supreme Court stated: "an arbitral decision may be admitted as evidence" (emphasis added), and then quoted Alexander regarding the "weight to be accorded in arbitral decision" upon its admission. There was no discussion whatsoever of its admissibility subject to hearsay challenge.

In Costa v. Desert Palace, Inc., 299 F. 3d 838 (9th Cir. 2002), the Ninth Circuit considered the same issue, and held that the arbitration decision was inadmissible hearsay. The Court stated:

Caesars argues that the trial court's exclusion of arbitration decisions, relating to the incident that ultimately triggered Costa's termination, was an abuse of discretion so prejudicial that a new trial is warranted. The incident that led to Costa's termination was the altercation with Gerber in the elevator. In an arbitration brought pursuant to their collective bargaining agreement, both Costa and Gerber challenged the discipline imposed, to no avail. At the discrimination trial, having successfully argued that hearsay rules blocked Costa's attempt to introduce transcripts of the arbitration hearing, Caesars later sought to introduce the arbitrator's decisions. Costa responded by

raising a hearsay objection and arguing that admission of the decisions would be irrelevant because the central issue of the trial-sex discrimination-was not addressed in the arbitration.

Costa is correct that discrimination was not covered by the collective bargaining agreement and was not at issue in the arbitration. Thus, the present case can be distinguished from *Alexander v. Gardner-Denver Co.,* 415 U.S. 36, 38, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974), in which the Supreme Court established an employee's right to pursue both Title VII judicial remedies and arbitration "under the nondiscrimination clause of a collective-bargaining agreement." Because we review for abuse of discretion the narrow evidentiary issue before us, we need not address the scope of *Gardner-Denver* or broader issues with respect to the preclusive effects of arbitration on subsequent discrimination claims. *See, e.g., Gilmer v. Interstate/Johnson Lane Corp.,* 500 U.S. 20, 35, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991). Other courts have held that district courts have discretion to exclude arbitration awards in similar circumstances. *See, e.g. Jackson v. Bunge Corp.,* 40 F.3d 239, 246 (7th Cir.1994); *McAlester v. United Air Lines, Inc.,* 851 F.2d 1249, 1259 (10th Cir.1988); *Perry v. Larson,* 794 F.2d 279, 284-85 (7th Cir.1986). Under these circumstances, it was not an abuse of discretion for the district court to exclude the arbitration decisions. *See United States v. Hernandez-Herrera,* 273 F.3d 1213, 1217 (9th Cir.2001) (standard of review).

Nance objected to the admissibility of the arbitral award in her Appellant Brief to the Sixth Circuit. (Appx. Pgs. 46-47). She further objected to the Arbitrator's opinion in the district Court as "deficit". (Appx. 687). Nance further objected to the Arbitrator's opinion because the CBA does not contain language requiring the arbitration of federal and state statutory disability claims, or other state statutory claims. (Appx. 689). As in Costra, supra, Nance also objected to the Arbitrator's opinion on the basis that the opinion does not discuss her ADA claims, nor address issues regarding the unsafe working conditions. (Appx. 690). She was not represented by legal counsel for the arbitration. (Appx. 691).

As in Costa, supra, the Nance case is distinguishable from Alexander v. Gardner-Denver Co., 415 U.S. 36, 38 (1974) because disability discrimination and the FMLA were not covered by the Collective Bargaining Agreement and not at issue in the arbitration proceedings. Petitioner requests that the U.S. Supreme Court reverse because the Sixth Circuit's decision was based upon the arbitrator's decision which is inadmissible hearsay.

II. The Sixth Circuit's Decision in using an arbitration decision under a Collective Bargaining Agreement to resolve ambiguities of fact on a de novo review under the Petitioner's ADA and other claims Warrants Review.

As set forth in the Sixth Circuit's decision, an "employee is not barred from bringing a subsequent statutory claim against her employer based on discriminatory conduct, because arbitration over

contractual disputes under a collective bargaining agreement is of a "distinctly separate nature" than "independent statutory rights accorded by Congress. And, a "federal court should consider the employee's claim de novo." Id. at 59-60. *See also* Wright v. Universal Mar. Serv. Corp., 525 U.S. 70 (1998). The action arises not out of contract, but out of the ADA, and is distinct from any right conferred by the collective-bargaining agreement. Wright, 525 U.S. at 80.

After reviewing the record, the Sixth Circuit granted summary judgment based upon the arbitration opinion stating:

> Finally, according to the factors listed in *Alexander,* Nance's prior arbitration resolves any ambiguity in favor of Goodyear. First, the hearing appeared to be procedurally adequate. Though Nance claims she was not represented by counsel, the record indicates that both Union representatives and a Union attorney appeared on her behalf, and that she was afforded an opportunity to present evidence, cross-examine witnesses called by Goodyear, and offer arguments in support of her position. And while the arbitral determination failed to give any consideration to Nance's ADA claims, the issue in dispute was "solely one of fact, specifically addressed by the parties and decided by the arbitrator on the basis of an adequate record."*Alexander*, 415 U.S. at 60 n. 21.

The analysis of the Sixth Circuit is incorrect, and its reliance upon the arbitrator's decision to resolve "any ambiguity" in favor of Goodyear is erroneous. The

hearing was not procedurally adequate. The Sixth Circuit admits that Nance's ADA claims were not given any consideration in the arbitration proceedings. Thus, the Sixth Circuit's consideration of the arbitration opinion under such circumstances contravenes the independent statutory rights granted by Congress, and the Petitioner's right to a de novo review of the same.

The Sixth Circuit properly held that Nance did not waive her rights to proceed in the federal courts on her ADA, and other claims when she participated in the arbitration proceedings. Yet, the Court's use of the adverse arbitration decision to then resolve ambiguities in the facts before the Court is inapposite to the federally mandated de novo review.

Nance's arbitration of her claims under the terms of a collective bargaining agreement was not done individually. Rather, she was represented by union representatives, which as set forth in Alexander, supra, at 58, raises a serious concern about whether the overall interest of the union for all its employee members compromised her individual interests. The Alexander Court states:

> In arbitration, as in the collective-bargaining process, the interests of the individual employee may be subordinated to the collective interests of all employees in the bargaining unit. Moreover, harmony of interest between the union and the individual employee cannot always be presumed, especially where a claim of racial discrimination is made. In this respect, it is noteworthy that Congress thought it

> necessary to afford the protection of Title VII against unions as well as employers.

Id. at 58 n. 19, 94 S.Ct. at 1024 n. 19.

The union had less incentive to fully and vigorously fight on behalf of Nance, especially where she had filed a sexual harassment claim against two of its own union officers for calling her "pussy" (which was corroborated by union official Kenneth Rushing). (Appx 908, 911, 1167). Thus, as in Gray v. Toshiba America Consumer Products, 959 F. Supp. 805, 811 (M.D. Tenn. 1997), there is a concern with the union's representation of the collective interests of all of its members rather than of Nance's individual rights.

Moreover, as in Gardner-Denver, supra, the arbitrator who decided Nance's claim was constrained by the terms of the collective bargaining agreement which did not include consideration of her disability and other federal statutory claims. Therefore, where these federal laws conflicted with or modified the collective bargaining agreement, the arbitrator did not invoke such laws to vindicate her rights and his authority was too limited to safeguard her rights See Gray, supra, at 812. As set forth in Gray:

> Among these is the fact that the specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land. United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581-583, 80 S.Ct. 1347, 1352-1353, 4 L.Ed.2d 1409 (1960).[FN18] Parties usually choose an arbitrator because they trust his knowledge and judgment concerning the demands and norms of

> industrial relations. On the other hand, the resolution of statutory or constitutional issues is a primary responsibility of courts, and judicial construction has proved especially necessary with respect to Title VII, whose broad language frequently can be given meaning only by reference to public law concepts.

Further militating against the use of the Arbitrator's opinion to resolve ambiguities of fact are that there is no transcript of the proceedings, the rules of evidence did not apply, and rights to discovery, compulsory process, cross-examination were not available to Nance who did not have her own independent legal counsel. Gardner-Denver, supra at 58, citing Bernhardt v. Polygraphic Co., 350 U.S. 198, 203, 76 S.Ct. 273, 276, 100 L.Ed. 199 (1956); Wilko v. Swan, 346 U.S., at 435-437, 74 S.Ct., at 186-188. As set forth in Gardner-Denver, these characteristics are the reason that arbitration is a less appropriate forum for final resolution of discriminatory employment claims. The Court warns that "courts should ever the mindful that Congress, in enacting Title VII, thought it necessary to provide a judicial forum for the ultimate resolution of discriminatory employment claims", and "it is the duty of courts to assure the full availability of the forum." Id. at 58, n.19.

The Sixth Circuit's holding was that Nance cannot show that she suffered an adverse employment action due to the decision of the Arbitrator that she voluntarily resigned, and thus can not establish a prima facie case of discrimination. The Court states that "Under Article X (c) of the CBA, an employee who is absent for seven scheduled work days or more, without calling in to Goodyear explaining the reasons

for her absence, is considered to have resigned without notice." (Opinion, pg. 10). The key word is "*scheduled*" work days or more. The facts before the court are that Nance was never scheduled for work days during the relevant time period as admitted by Tom Gossett, Goodyear's 30(b) (6) witness. Nance was not scheduled for work days because she had been placed on the Employment Roll as an inactive employee.

> Q. Okay. Well, you said that if you are on the employment roll, it means that you are inactive which means you are taken out of the payroll system.
>
> A. Yes.
>
> Q. What else does it mean? Anything else as far as that employee being treated or handled any differently by Goodyear as far as the bookkeeping, as far as the scheduling, as far as anything?
>
> A. They are not scheduled to come to work.

(Appx. 1004).

This was confirmed by John Noel, who was Nance's Area Manager at Goodyear. He testified that when an employee is on the Employment Roll, "sometimes they would call from time to time." (Appx. 883). But, Nance would not be scheduled for work until she showed up with a doctor's note. (Appx 881-884, 896). Wesley McClure, who was the Business Systems Auditor (management position) for Goodyear, also testified that Nance was an "inactive" employee at the time she was terminated. (Appx. 917, 920).

And, Nance did report of "on occasion." The record is undisputed that Nance *did* report off on November 7, 2003; January 12, 2004; January 13, 2004; January 16, 2004; March 2d, 2004; and March 3rd., 2004. (Appx. 921-24, 1074). Nance's submission of her Accident & Sickness Forms of November 7, 2003 (Appx. 1106-1106) and January 6, 2004 (Appx. 1113-1114), also constitute reporting off.

And, contrary to the Sixth Circuit panel's statement that "it is undisputed that the contract has been universally interpreted " to require reporting off while on medical leave (Opinion, pg. 11), there is in fact a prior arbitral decision against the same Goodyear plant of *In the matter of Arbitration Between: The Goodyear Tire & Rubber Company, Union City Plant and John McAlister, PTB-04* (Appx. 1154-1161), that states just the opposite. In *McAlister*, the employee was injured while trying to unjam a Banbury machine, which is the same machine that Nance worked on prior to her termination. He had medical treatment, for a laceration behind his left ear and missed two days of work. He was then put on light duty for 4 days, and then returned to regular duty. He then reported off for October 12, and brought an Accident & Sickness form to the plant which was signed by his physician and ran from October 12 indefinitely. This was his last written submission until a December 17 Accident and Sickness form covering the period October 12 to current. The company terminated him under Article X(c)(2) for failing to report off. The employee filed a grievance, and question decided was *"Did the company violate the collective bargaining agreement and past practice when it terminated Grievant? If not, what shall be the remedy?"*

The *McAlister* decision held that Goodyear could not terminate the employee where the contract otherwise provides for accumulation of seniority. The decision relies upon Article X(b)(9) of the Collective Bargaining Agreement, which states:

> An employee who receives Workers' Compensation payments shall accumulate seniority during the period covered by compensation payments. If at the end of such period, he is physically unable to return to work he shall accumulate seniority for any additional period during which he shall furnish satisfactory evidence of continuing disability.
>
> An employee who is unable to work due to disability caused by an injury in the factory or from occupational illness for which he does not receive Workers' Compensation payments shall accumulate seniority for the period of time during which he is unable to work provided he shall furnish satisfactory evidence of continuing disability. (Appx. 1160).

The *McAlister* decision states:

> Greivant provided satisfactory evidence of continuing disability to the Company and his disability was caused by an injury in the factory. He apparently did not receive Workers' Compensation, but under the applicable provision, was required to accumulate seniority for the period of time covered by his evidence of continuing disability. *Giving this fact, Grievant was not subject to termination under Article X (c) (2).*(emphasis added). (Appx. 1161).

The *McAlister* Award held that "Greivant was removed from the payroll in violation of the collective bargaining agreement. He shall therefore be reinstated with retroactive seniority and benefits."(Appx. 1161).

Just as in *McAlister*, Nance could not be terminated for not reporting off because she was on a medical leave of absence due to an on-the-job injury as documented by her treating psychiatrist. Louis M. Wells, M.D. states where asked on the Goodyear Accident & Sickness Form if her injury arises out of her employment, that she has "chronic neck pain" and her "Emotional features" are " due "to inability to perform job." On the Goodyear Accident & Sickness Form, he checks that the disability is due to an accident. (Appx. 1114). He testified that her condition was related to events that occurred at Goodyear. (Appx. 1289).

As in *McAlister,* Article X(b)(9) of the Collective Bargaining Agreement prohibits Nance's termination because she was required to accumulate seniority for the time period covered by her evidence of continuing disability. (Appx. 1084). She had not been released to return to the machine cleaner job at the time she was inappropriately terminated under Article X(c)(2), and as in the *McAlister* decision, she could not be terminated under the express terms of the Collective Bargaining Agreement.

Nance did not voluntarily resign, and *can* claim that she suffered an adverse employment decision from the facts that are before this federal court. As set forth above, the use of the Arbitrator's decision to resolve ambiguities in the facts in this case is erroneous where the arbitrator did not consider her

federal statutory rights, and the proceedings did not afford the statutory procedural safeguards provided in a federal court de novo review.

III. The Sixth Circuit's Decision that Petitioner was not constructively discharged where she was disabled, and was placed in a dangerous workplace condition in front of a vat of boiling oil without a safety gate or adequate lighting for over four days Conflicts with Other Circuits.

As to her constructive discharge claim, the Sixth Circuit panel mistakes that Nance did not file a grievance over the safety concerns. (Opinion, pg. 12). She did. (Appx. 1143). And, she was on the banbury job for five days, as opposed to the four days cited by the Court. (Opinion, pg. 12)(Appx. 1169). Nance repeatedly complained each day regarding the safety violation to numerous management personnel. (Appx. 1170). Wesley McClure, the Business Systems Auditor, acknowledges that she complained to one of her managers, Lane Jackson, about the safety issues while she was working as a machine cleaner. (Appx. 942).

As testified to by Wayne Fields, labor trainer for Goodyear, the safety gate for the Banbury machine where Nance was assigned to machine clean, is "a bar that laid right in front of the gate." (Appx. 860). It "hangs right in front of the gate", and "is made of a chain" and "it sets in these little old slots." (Appx. 861). On the other side of the safety gate is "the chute" which is an opening that goes down to the "pelletizer" or the "rollerdizer". (Appx. 861-862). "The rubber goes through the Banbury, through the chute and if it come

out through a pelletizer. It come out in pellet form." (Appx. 862). "And, then if it come out on rollerdize, it comes out in the slab form." (Appx. 862). The safety gate is to "keep from, to keep from falling into "the chute". (Appx. 863). If you fell into the chute then "You'd be a pellet." (Appx. 863-864).

It's hard to see how management could not foresee that Nance would feel constructively discharged by being asked to work constantly in front of the chute without the safety gate in place, since Goodyear's own Safety Rules for the machine cleaner position state that:

> BEFORE WORKING AROUND BANBURY DISCHARGE GATE, be certain, the safety bar/door is in place in front of discharge gate chute.
>
> (Appx. 1165).

The employees were instructed to make sure they put them [the safety bars] back on if removed. (Appx. 874-75, 894). And, as testified by Tony Westbrook, labor trainer, the Goodyear safety rules require "in that particular area" that you are not supposed to work "until you get the gate back up." (Appx. 797).

There can be no dispute that the removal of the safety gate would constitute unsafe and dangerous working conditions. Wesley McClure, the Business Systems Auditor, testifies that the rubber that drops through the banbury machines ranges in temperature from 220 to 280 degrees. (Appx. 936). The chute drops down to the basement floor to the pelletizer. (Appx.

937). When shown the photograph of the banbury chute (Appx. 1071), McClure, testified,

> Q. Okay. On this Exhibit Number 35 you see those two rubber hoses?
>
> A. Yes.
>
> Q. And then it looks like a drop-down. Is that where it drops down to the basement floor?
>
> A. Yes.
>
> Q. Under those hoses?
>
> A. Yes.
>
> Q. Okay. How deep is that?
>
> A. I couldn't give you a good guess on how deep it is.
>
> Q. I mean, does it go all the way to the basement floor, that hole does?
>
> A. Yes. It does down to the basement to the pelletizer.
>
> Q. Okay. So if you fell down there, you'd fall all the way down to the basement floor?
>
> A. You'd fall down to the pelletizer.

(Appx. 937).

Tony Westbrook, labor trainer, testified that the Goodyear safety rules require that "before you're working around the gate cleaning up or whatever you're around it for, you should make sure that the safety bar is across in front of it." (Appx. 778). The safety gate is "to keep you from slipping or falling down into a little hole." (Appx. 778). The hole leads to the basement fifteen or twenty feet below to the roller dye or pellitizer. (Appx. 778-779). One purpose of the safety gate "is to keep you"—"from falling in the chute" (Appx. 782).

The photo in the record has the safety bar in place (Appx. 1071). Her own Area Manager, John Noel, testified that if she did fall in the hole, "if someone didn't see them, they could get pelletized or rollerdized." (Appx. 891). He testified that all employees were told "not to leave them off." (Appx. 894). She was placed to work in front of the vat the entire day without the safety bar and lighting, unlike any other worker, and when she complained the supervisors would get ticked off. (Appx. 1062, 1119-1120, 1126-1131, 1172-73).

Waggoner, union official and tirebuilder, testified that she was trained differently in that she was only given the task of dipping oil, which placed her in front of the chute all day. (Appx. 983-84). This was confirmed by Tony Westbrook, labor trainer. (Appx. 776-777).

Nance went out on medical leave of absence due to her mental health condition which was diagnosed in part as "a condition in which you have a fear of an event or situation in which you can't escape", "such as being in an elevator or some people have to open space

when they feel unprotected." (Appx. 1224). Obviously, this condition developed as a result of Nance's fear that she would fall into the vat of rubber to her death. (Appx. 1135, 1166, 1288).

And there is further evidence of bad faith. Waggoner testified that they were harassing Nance during the time that she was assigned to the machine cleaning job:

A. I tell you what, I do remember about that particular time. I remembered there being some friction. Both from management towards Marcia and from Marcia toward management. I remember having some discussions, particularly one discussion, I shouldn't say discussions, but I had one discussion with Lane Jackson where I pointed out to him that, that we was trying to find a ADA protected individual a job in that plant that they could perform and that management was paying her different types of attention than what they was a normal employee that they was opening themselves up to a lawsuit. And I said,

> "Lane, you understand it's not just a normal grievance we're dealing with here, your messing with this woman's life." And I, I do remember having a discussion of that type of parameters with Lane.
>
> Q. So, so what prompted you to have that discussion with him?
>
> A. I became aware that a management person went into the break area and sat beside Marcia, kinda like this is management, and who it was

I don't recall, but it was her supervisor trying to, like he was timing her, harassing her. That would be attention that wasn't given to other individuals in the Banbury.

Q. Okay.

A. And it—I remember it irritated me.

Q. Okay. So, so you made a complaint with Mr. Jackson on her behalf?

A. Complaint's probably mild.

Q. And was that when she was assigned to the machine cleaning position?

A. That's when she was in the machine cleaning.

(Appx. 987-88).

As to the failure to provide a reasonable accommodation, there is proof that Goodyear acted in bad faith in that it did not provide the strong arm for Nance on the Stock Trucker job as a reasonable accommodation. And, when she requested these accommodations, she was medically disqualified.

Q. So my question is, what did you say at that meeting?

A. I asked for the strong bar--the strong arm, and as a result I got medically disqualified.

> Q. Okay. Did anybody respond to you or say anything in that meeting besides you?
>
> A. Lane Jackson responded, and –
>
> Q. What did he say?
>
> A. –he said that he was medically disqualifying me.

(Appx. 1057).

Nor, was she provided with a radio which her Area Manager, John Noel, confirms is needed to do the job. (Appx. 885-886). She did not remove herself from the position because of neck and shoulder pain as stated by the Sixth Circuit panel. (Opinion, pg. 13). She asked for the reasonable accommodations, and then was medically disqualified. (Appx. 1056-1058).

The panel further misstates the facts that Goodyear's physical therapist officially recommended the crude coffee can and two Teflon pans provided by Goodyear as a reasonable accommodation to Nance on the machine cleaner job. (Opinion, pg. 13). They were not recommended by Goodyear's physical therapist. When shown the photo of the crude tools in her deposition, Gilliam, the physical therapist for Goodyear was outraged:

> A. But that looks like a frying pan from a kitchen and I have never recommended that any person go to a company and use a frying pan. And I'm a little offended, I'm offended because it appears that I have somehow said to this

employee to do this and let's go on the record. I never said to use a pan like that. (Appx. 966)

A. I am upset about it. Because I feel like there was some questioning that I document somewhere to Goodyear to use something that appears to look like a frying pan. Now, I mean, if the person, if that's what they gave her to scoop it out with, and that's the only thing they had, and it didn't exceed her requirements, I guess that's what, you know, they gave her. But you know, it needs to be on the record that I did not say to use something like that. (Appx. 968). And, Nance did disputed their effectiveness, as corroborated by union official Kenneth Rushing (Appx. 905-906). Even Tony Westbrook, labor trainer, admits that "I think the pan didn't work very well." (Appx. 784).

In Wells v. Wal-Mart Stores, Inc., 219 F. Supp. 2d 1197, 1204 (D. Kan. 2002), the Court held that summary judgment was precluded where an employer's legitimate nondiscriminatory reason for firing an employee was pretext for retaliatory discharge where he was terminated for violating the "three day no call no show rule" and had not been released to return to work by his personal physician. Likewise, Nance had not been released to return to work, and Goodyear's contention that she was fired for a seven day no report is unfounded where she had left work to obtain medical treatment due to the dangerous working conditions, and had in effect already been constructively discharged before the date of her alleged failure to report off.

In Kelly v. Classic Restaurants Corp., 2003 WL 22052845 (S.D.N.Y. 2003), the court considering an employee's Age Discrimination in Employment Act (ADEA) claim, held the arbitration clause in the union- negotiated contract did not preclude the employee from raising his ADEA claims in federal court. The Court stated that:

> Lastly, it is also worth noting what the arbitrator did *not* decide. The narrow question before the arbitrator was whether plaintiff resigned on or about June 1, 2001. *See* Kanter Aff., Ex. A at 1-2. The arbitrator was *not* presented with, and did not reach, the question of whether the Restaurant discriminated against plaintiff in violation of the ADEA. Furthermore, irrespective of the weight this Court ultimately gives the arbitrator's decision, plaintiff nonetheless may still attempt to show that the Restaurant subjected him to a hostile work environment or in some other manner discriminated against him in violation of the ADEA during the period that he was employed.[FN4] He may also argue, in the event he is bound by the arbitrator's determination, that his resignation was effectively a "constructive discharge" due to a hostile work environment. *See e.g. Stetson v. Nynex Serv. Co.*, 995 F.2d 355, 360 (2d Cir.1993) (a constructive discharge exists when "the employer deliberately made [the plaintiff's] working conditions so intolerable that he [the plaintiff] was forced into an involuntary resignation.") (internal quotations omitted).

As in Kelly, it is undisputed that the arbitrator in this case did not decide Nance's ADA, FMLA, and other statutory claims, or the issue of her constructive discharge. Nance is entitled to a de novo consideration of these claims. The decision of the Sixth Circuit should be reversed as to her constructive discharge for a true de novo review, due to its admitted reliance in error on the same arbitrator's decision that did not give any consideration to these claims.

IV. The Sixth Circuit's Decision that the work hours awarded by the state court for Nance's worker's compensation award should not be included in the 1250 hour calculation under 29 USC 2611 (2)(a)("FMLA") Warrants Review.

Contrary to the Sixth Circuit's statement, Nance does not argue that her post-termination hours should count toward the FMLA calculation. (Opinion, pg. 14). Instead, she argues that her pre-termination work hours which were awarded by the state court on her workers' compensation complaint should be included in the 1250 work hours required used to qualify for Family Medical Leave. Thus, Nance submits that under the reasoning of Ricco v. Potter, 377 F. 3d 599, 605 (6th Cir. 2004), she meets the 1250 requirement because the hours awarded by the state court for her worker's compensation award were "hours that the employee wanted to work but was unlawfully prevented by the employer from doing so."

In Ricco, supra, the worker argued that the district court erred by adopting the reasoning of Plumley v. Southern Container, Inc., 303 F. 3d 364, 367 (1st Cir. 2002), in which the First Circuit held that the hours-

of-service requirement contained in the FMLA's definition of "eligible employee" includes only hours during which an employee performed actual work, not hours for which an employee was compensated pursuant to an arbitration award". The Ricco, Court held that the hours-of-service requirement contained in the FMLA's definition of "eligible employee" included hours for which an unlawfully terminated employee was compensated pursuant to a make-whole arbitration award. The Court noted that neither the FMLA nor the FLSA defines the term "hours of service".

The FMLA specifies that to determine if an employee meets the hours of service requirement, the legal standards established under the FLSA apply. The FLSA regulations explain, "the determining factor is the number of hours an employee has worked for the employer within the meaning of the FLSA." 29 C.F.R. 825.110. The Ricco Court explains that the FLSA does not define the term hours of service, but does provide a definition of "regular rate" standards for determining the rate at which employees must be compensated for engaging in overtime work. 29 U.S.C. 207. "The FLSA specifies that an employee's 'regular rate' of compensation does not include, among other things, payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause; reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of this employer's interest and properly reimbursable by the employer; *and other similar payments to an employee which are not made as compensation for his hours of employment.* 29 U.S.C. 207(e)(emphasis added)." *Id.* at 604.

The Ricco Court concluded that the time an employee would have worked but for her unlawful termination and was paid pursuant to an arbitration award was not "an other similar cause" within the meaning of the FLSA. These are hours that the employee "wanted to work, but was unlawfully prevented by the employer from working." *Id.* at 605. The Ricco Court reasoned that denying employees credit toward the hours of service requirement for hours they would have worked, but for their unlawful termination, would unfairly reward an employer's unlawful conduct. *Id. See also,* Savage v. Chicago Transit Auth., 2007 WL 809600 (N.D. Ill. Mar 07, 2007).

It is undisputed that Nance received a workers compensation Judgment in the Chancery Court of Lake County, Tennessee, entered on April 19, 2004. (Appx. 1064). The Court found that she sustained a 55% permanent impairment partial disability to the body as a whole, and awarded her $108,873.60 for 220 weeks at the compensation rate of $494.88 per week. (Appx. 1065). The Court's Judgment states, "51 weeks or $25,238.88 have accrued and will be paid in a lump sum. The remaining 169 weeks will be paid periodically." (Appx. 1065).

If Nance had not been injured on the job, then she would have been at her job assignment for at least 1250 hours during the 12 months prior to her injury. Instead, she was having bone fusion surgery and physical therapy. The 51 weeks of her workers' compensation award should be counted towards her requisite 1250 hours of service.

Under Tenn. Code Ann. 50-6-102, the "maximum weekly benefit" is "maximum compensation paid to the worker per week.". "The purpose of workers' compensation is to provide injured workers with periodic payments as a substitute for lost wages in a manner consistent with the worker's regular wage. Van Hooser v. Mueller Co., 741 S.W. 2d 329, 330 (Tenn. 1987), " Lindsey v. Strohs Companies, Inc., 830 S.W. 2d 899, 903 (Tenn. 1992).

It is undisputed that during much of 2003, Nance was prevented from working due to her on the job injury. She received a lump sum award for 51 weeks that "have accrued" as of the Court's ruling at the trial on March 9, 2004. (Appx. 1065). At least 35 of these 51 weeks should apply towards the time-period before the Plaintiff left on medical leave on November 7, 2003. Multiplying 35 weeks times a forty hour work week, results in 1400 hours of service under this calculation. This does not include any hours Nance actually worked, if any, prior to the commencement of the 35 week calculation in 2003. As in Ricco, under 29 U.S.C. 2612(a)(1), the weeks accrued under her workers compensation award should be utilized in determining her hours of service for the FMLA leave request.

CONCLUSION

For all the foregoing reasons, Petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

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APPENDIX

APPENDIX A

RECOMMENDED FOR FULL-TEXT PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 06-6563

[Filed May 23, 2008]

MARCIA B. NANCE, *Plaintiff-Appellant*,	)
v.	)
THE GOODYEAR TIRE & RUBBER COMPANY, *Defendant-Appellee*.	)

Appeal from the United States District Court for the Western District of Tennessee at Jackson. No. 04-01307—James D. Todd, District Judge.

Argued: October 31, 2007

Decided and Filed: May 23, 2008

Before: BATCHELDER, MOORE, and COLE, Circuit Judges.

COUNSEL

ARGUED: Carolyn J. Chumney, Memphis, Tennessee, for Appellant. Herbert E. Gerson, FORD & HARRISON, LLP, Memphis, Tennessee, for Appellee. **ON BRIEF:** Carolyn J. Chumney, Memphis, Tennessee, for Appellant. Herbert E. Gerson, Timothy S. Bland, Thomas J. Walsh, Jr., FORD & HARRISON, LLP, Memphis, Tennessee, for Appellee.

COLE, J., delivered the opinion of the court, in which MOORE, J., joined. BATCHELDER, J. (pp. 16-20), delivered a separate opinion concurring in the judgment.

OPINION

R. GUY COLE, JR., Circuit Judge. Plaintiff-Appellant Marcia B. Nance appeals the district court's grant of summary judgment to Defendant-Appellee Goodyear Tire and Rubber Co. ("Goodyear") on her claims alleging violations of the Americans with Disabilities Act, the Tennessee Handicap Act, and the Family and Medical Leave Act; retaliatory discharge, including violations of the Tennessee "whistleblower" law; wrongful and constructive discharge through alleged retaliatory conduct; outrageous conduct and intentional infliction of emotional distress in violation of Tennessee common law; and breach of a common law duty of good faith and fair dealing. For the following reasons, we **AFFIRM** the judgment of the district court.

I. BACKGROUND

A.

Goodyear hired Nance on June 22, 1998, as a bargaining-unit employee in its Union City, Tennessee tire-manufacturing plant. Nance was initially employed in a bead-builder position, which requires the assembly of steel wires called "beads" that attach a tire to the wheel rim.

On November 15, 2000, Nance successfully bid under the collective bargaining agreement ("CBA") for a roll-changer position, which required her to load rubber strips onto a splicing machine. While working in that capacity, Nance injured her neck and shoulder and was diagnosed with cervical radiculopathy. On May 15, 2002, Nance's physician, Dr. William H. Knight, performed bone-fusion surgery on her cervical vertebrae by removing a bone from her hip and fusing it with two of the vertebrae in her neck. As a result of her injury, Nance took a medical leave of absence for approximately a year, from May 2002, the time of her surgery, until March 2003.

In anticipation of Nance's eventual return to work in 2003, Dr. Knight and a workers' compensation representative from Goodyear, Rebecca Duke, requested a functional capacity evaluation ("FCE") for Nance primarily to determine whether she could resume the roll-changer position she held before her injury. For several hours over a two-day period (February 3-4, 2003), Jacqueline Gilliam, a Goodyear physical therapist, performed a complete examination of Nance. The tests Gilliam conducted showed that Nance could lift a maximum of thirty pounds from the

floor, twenty pounds overhead, and thirty pounds horizontally; that she could carry a maximum of twenty pounds in her right hand, twenty pounds in her left hand, and twenty-five pounds in both hands; that she could generate a forty-six to fifty-four pound "push-pull force;" and that she had a grip strength of seventy-three pounds in the right hand and seventy-seven pounds in the left hand. According to Gilliam, this meant Nance could tolerate "positional activities such as elevated work, forward bending, sitting and standing on a frequent basis, as well as rotational sitting . . . rotation in standing, crawling, kneeling, crouching, repetitive squatting, sitting and standing, walking, stair climbing, step ladder climbing, balancing, and coordination." (Joint Appendix ("JA") 512.) However, Nance's injury limited "[v]ertical ladder climbing and material handling abilities." (JA 266.) Officially, she was placed in the "Light and Medium" Physical Demand Category because she was unable to lift weight continuously.

Comparing the physical demands of the roll-changer position and the FCE results, Gilliam concluded that Nance could not physically perform her duties in that position. Goodyear therefore disqualified Nance as a roll changer. After Nance's FCE, Gilliam searched all bargaining-unit jobs in the Goodyear plant and reported that none matched Nance's physical abilities. Following this report, Nance met several times with Union and Goodyear representatives to discuss further efforts to identify a position which she could perform. Nance and the various representatives reviewed lists of jobs in the plant, considering Nance's limits and each job's physical requirements. During these ongoing accommodation efforts, Gilliam learned that Nance

was qualified and eligible to work as a stock trucker, which would require her to drive fork-lift trucks to transport materials within the plant. By letter of May 22, 2003, Gilliam opined to Human Resources representative Kathy Hill that Nance could perform the duties of that job.

Nance returned to work as a stock trucker on June 16, 2003. After a few weeks, Nance removed herself from that position because she claimed that Goodyear did not accommodate her physical limitations in a number of areas, and that vibrations from the fork-lift caused pain in her neck and shoulder. According to Nance, Goodyear failed to provide her with a strong arm-lift support to help her lift the side panel off the fork-lift to change the battery, a radio to communicate with her co-workers, or assistance from her co-workers to help change the battery. Her disqualification as a stock trucker became official at a meeting on October 3, 2003, at which Nance, a union steward, and two Goodyear representatives were present. Nance did not file a grievance over her disqualification, and she remained off work on another period of medical leave related to a hysterectomy performed on July 23, 2003.

On October 28, 2003, Gilliam re-analyzed the job tasks associated with the "Banbury" mixer machine-cleaner. Gilliam originally deemed Nance medically incapable of performing this job, but upon a second review, she concluded that Nance could perform the job if Goodyear implemented certain accommodations. The Banbury mixers produce the rubber compounds used in tires and, during their operation, discharge a steady trickle of oil down a trough and into a five-gallon bucket. Machine cleaners in the Banbury area are normally responsible for keeping the premises

clean and free of debris. One of the responsibilities of a machine cleaner is to empty the bucket as needed, usually by carrying the bucket containing the discharged oil down an aisle and pouring it into a drum. The position is an established bargaining-unit position held at any given time by approximately eleven to fifteen Goodyear employees, working in three shifts over a twenty-four hour period. To accommodate Nance's lifting restrictions, Gilliam proposed adjusting some of the machine-cleaner duties and suggested the creation of special tools like a hand-held scoop, which Nance could use to remove oil from the bucket incrementally rather than waiting for it to become completely full. Gilliam also recommended that Goodyear give Nance a smaller scraper than those normally used to clean "fine baskets," containers that must be cleaned once every shift. Following Gilliam's recommendation, on November 3, 2003, Goodyear placed Nance in the machine-cleaner position. She was given a ladle consisting of a coffee can welded to a rod to remove oil in smaller increments and two teflon-coated pans to scoop out sludge from the oil buckets as needed. Goodyear also added a hook onto the side of the pans to eliminate the force necessary for emptying them.

Nance worked as a machine cleaner for four days, last reporting to work on November 7, 2003. According to Nance, she left the job because Goodyear did not permit her to perform the other parts of the machine-cleaner job, and instead limited her to emptying the oil buckets; because Goodyear refused to replace a safety gate and provide adequate lighting; and because she found the job mentally difficult. She also claimed that the position was neither meaningful nor safe.

After Nance left work, Dr. Louis M. Wells, her psychiatrist, diagnosed her on December 15, 2003, with adjustment disorder with mixed emotional features, panic disorder, and agoraphobia, an anxiety disorder involving the fear of certain settings that may present unexpected challenges or demands. As a result of his diagnosis, Dr. Wells wrote a note requesting that Nance be excused from work through January 6, 2004, when she was to be reevaluated. Shortly thereafter, Hill sent Nance a letter advising her that Goodyear was placing her on a medical leave of absence for her stated inability to work. Hill's letter reminded Nance that she was "responsible for reporting off to [her] resident department while [she was] on medical leave of absence."[1] (JA 284.)

In the midst of all this, on January 9, 2004, Nance, her attorney Timothy Boxx, Goodyear's workers' compensation manager Jane Holland, and Goodyear attorney James Glasgow, Jr., met in an attempt to settle Nance's workers' compensation claims from her

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[1] Goodyear argues on appeal that Nance's medical leave expired on January 7, 2004. Dr. Wells filled out a Family and Medical Leave Act form on Nance's behalf, dated January 6, 2004, indicating that Nance's current medications had resolved the previously diagnosed panic attacks and agoraphobia and that her current disability was not due to a psychiatric condition. However, Dr. Wells left blank the line asking, "When should patient be able to return to work?" At the very least, even if she was capable of returning to work after January 6, 2004, it is undisputed that at the time Goodyear concluded that she "resigned without notice," Goodyear had technically placed her on "Employment Roll," which is reserved for inactive employees on extended leaves of absence. We therefore assume for the purposes of this appeal that Nance was on a medical leave of absence at the time Goodyear removed her from the company.

2002 injury. In a discussion after the conference, Boxx contends that he told Holland that Nance would not return to work, though Nance claims that Boxx stated only that she would not return to the machine-cleaner position.

After January 9, 2004, Nance did not return to work, nor did she call in to report her absences. A few weeks later, on January 29 and 30, 2004, Lee McClure, then Goodyear's business center auditor for the plant's Banbury area, attempted to reach her at her home by telephone. The first time he left a voice message which Nance said she did not receive. On January 30, Nance picked up, but she told McClure that she "could not talk to him . . . [a]nd [] hung up the phone." (JA 224.) Although Nance admits that she made no effort to call McClure back, she believed that Goodyear would send her a certified letter containing any information the company needed to convey. However, Goodyear viewed this interaction differently. Due to failed attempts to contact Nance, and her continuing absences, Goodyear sent her a letter dated February 19, 2004, and a Separation Notice dated February 23, 2004, advising Nance that she was being discharged from the company pursuant to Article X of the CBA. Article X states, in relevant part:

> An employee who is absent for seven (7) scheduled work days or more, without reporting to the Employer, shall be considered as having resigned without notice and his seniority will terminate.

After receiving the termination notices, Nance called Union and Goodyear representatives on March 2, 2004, to protest Goodyear's conclusion that she had

"resigned without notice." On March 3, 2004, the Union filed a grievance disputing her termination, which eventually culminated in arbitration.

B.

On June 16, 2004, Stanley H. Sergent presided as the arbitrator over a full evidentiary hearing. Nance was represented at the hearing by four Union representatives, and five witnesses testified under oath, including Nance and her attorney, Boxx. Two weeks after the hearing, Sergent entered an Opinion and Award holding that Goodyear had properly treated Nance as having "resigned without notice" under Article X of the CBA. He found that Nance had not justified her failure to comply with the report-off requirement of Article X and concluded that "since [Goodyear] properly considered the grievant as having resigned without notice her grievance is without merit and must be denied." (JA 415.)

Nance then filed the present action on November 22, 2004, alleging discrimination and retaliation in violation of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.*, and the Tennessee Handicap Act ("THA"), Tenn. Code Ann. § 8-50-103; violations of the Family and Medical Leave Act ("FMLA"), 28 U.S.C. § 2601 *et seq.*; retaliatory discharge, including violations of the Tennessee "whistleblower" law, Tenn. Code Ann. § 50-1-304; wrongful and constructive discharge through alleged retaliatory conduct; outrageous conduct and intentional infliction of emotional distress in violation of Tennessee common law; and breach of a common law duty of good faith and fair dealing.

After Goodyear moved for summary judgment, the district court granted all of Goodyear's claims, finding itself "bound by the arbitrator's decision that, pursuant to the terms of the CBA, Plaintiff resigned without notice from her employment instead of being terminated," and concluding that Nance was "barred from re-litigating the issue of her alleged wrongful discharge." (JA 1187.) The district court also found the remaining state law claims to be without merit. After the district court entered an order denying Nance's motion to alter or amend the judgment, Nance filed this appeal.

II. STANDARD OF REVIEW

We review de novo a district court's grant of summary judgment. *Miller v. Admin. Office of the Courts*, 448 F.3d 887, 893 (6th Cir. 2006). Summary judgment for Goodyear is appropriate "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). However, Goodyear bears the burden of proving that there are no genuine issues of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). The ultimate inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986).

III. ADA CLAIMS

Nance's disability discrimination claims present two distinct inquiries. First, as a threshold matter, did

the arbitration regarding whether Nance violated the terms of the CBA preclude her from re-litigating that issue in a related suit to vindicate her statutory rights under the ADA? If it did not, and we are allowed to consider the question, is Goodyear nevertheless entitled to summary judgment on the merits?

A.

Nance contends that the district court erred in finding that her ADA claims were barred by the arbitrator's conclusion that she had "resigned without notice," and points to *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), for the proposition that the arbitration of related contractual claims under a CBA does not bar de novo review of statutory claims in federal court. We agree. Generally, "once an issue has been fully litigated and necessarily determined by an adjudicatory body, a party and its privies are precluded from raising that issue in a subsequent proceeding." *Central Transp., Inc. v. Four Phase Sys., Inc.*, 936 F.2d 256, 260 (6th Cir. 1991). However, when an employee like Nance submits her grievance to arbitration, she is seeking only to vindicate her contractual rights under a collective bargaining agreement. Such an employee is not barred from bringing a subsequent statutory claim against her employer based on the same conduct, because arbitration over contractual disputes under a collective bargaining agreement is of a "distinctly separate nature" than "independent statutory rights accorded by Congress." *Alexander*, 415 U.S. at 49-50. Not only are the two forums independent, but they are in fact, according to the Court, "complementary since consideration of the claim by both forums may promote the policies underlying each." *Id.* at 50-51. In sum, an

employee should be able to "pursue fully both his remedy under the grievance-arbitration clause of a collective bargaining agreement and his cause of action under Title VII," and a "federal court should consider the employee's claim de novo." *Id.* at 59-60. *See also Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70 (1998) (holding that a collective bargaining agreement's general arbitration clause did not encompass an alleged violation of the ADA); *McDonald v. City of West Branch*, 466 U.S. 284 (1984) (applying *Alexander* to § 1983 claims); *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728 (1981) (same for the Fair Labor Standards Act).[2]

Goodyear argues, and the district court agreed, that *Alexander* and its progeny are distinguishable because Nance only arbitrated the question of whether she had resigned without notice as defined by Article X of the CBA. To be sure, *Alexander* differs from the instant case in that Alexander submitted both his discrimination and contract claims to arbitration whereas Nance's grievance involves only a contractual claim. The question, then, is whether a prior arbitration over a contractual issue precludes (or

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[2] The logic behind allowing de novo review of statutory rights is that arbitration under a collective bargaining agreement vindicates collective, contractual rights, whereas federal courts protect individual statutory rights. However, while *Alexander* stands for the proposition that the vindication of rights pursuant to statute is not precluded by res judicata, an employee may not be able to proceed with pendent state law claims (such as Nance's claim that Goodyear violated the duty of good faith and fair dealing). Either way, we need not decide this issue since, as will be explained below, summary judgment for Goodyear is appropriate.

"collaterally estops") a plaintiff from re-litigating that same issue in federal court. We think not.

In *Alexander*, the Supreme Court held "that the federal policy favoring arbitration does not establish that an arbitrator's resolution of a contractual claim is dispositive of a statutory claim under Title VII." 415 U.S. at 46 n.6. Like Nance, Alexander was a former African-American employee who filed both a claim of wrongful discharge under his collective bargaining agreement's grievance provisions and a statutory race-discrimination claim in federal court. While Alexander's Title VII claim was pending, an arbitrator ruled that he had been discharged for "just cause" because he produced too many defective or unusable parts, though the arbitrator made no express reference to his claim of racial discrimination. The district court determined that the arbitrator's decision precluded the court from reconsidering the issue, and granted summary judgment in favor of the defendants. The Tenth Circuit affirmed. The Supreme Court then reversed and concluded that courts should not defer to a prior arbitration even if the arbitrator has the full authority to rule on the claim and the court is presented with the same question as the arbitrator.

We find it difficult to distinguish this case from *Alexander*. In *Alexander*, the Court considered whether an adverse arbitration decision finding that Alexander was fired for "just cause" had a preclusive effect, and here, we consider whether an adverse arbitration decision finding that Nance "resigned without notice" has a preclusive effect. Both cases involve the adjudication of statutorily guaranteed rights, an inquiry that Congress reposed in federal courts.

This is also not the first time this Circuit has confronted and answered this question. In *Becton v. Detroit Terminal of Consol. Freightways*, 687 F.2d 140, 141-42 (6th Cir. 1982), the plaintiff, a discharged employee, appealed the district court's conclusion that a prior arbitration on whether the employee had been fired for "just cause" precluded a federal court from considering evidence on the underlying racial-discrimination claim. We concluded that the district court engaged in "an impractical and excessively narrow application of [*Alexander*]," *id.* at 142, because "[t]here is no realistic way to sever the discharge from the claim of discrimination," *id.* "Inasmuch as 'just cause' or similar contract questions are an integral part of many discrimination claims, the better rule avoids judicial efforts to separate and classify evidence offered by the plaintiff under the heading of 'discrimination' or 'just cause.'" *Id.*

The key point in this line of cases is clear: While the expertise of arbitrators lies in the application of facts to the terms of an employee's contract or collective bargaining agreement, the expertise of federal courts lies in the application of facts to anti-discrimination statutes. In other words, because "the specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land," *Alexander*, 415 U.S. at 57, whether Nance resigned without notice might mean one thing under Goodyear's CBA, but it might very well mean an entirely different thing for the purposes of an "adverse employment action" under the ADA. Thus, the legal *and* factual issues raised in Nance's ADA claim are beyond the competence of the ordinary arbitrator whose primary expertise concerns "the demands and norms of industrial relations." *Id.*

But even assuming that the resignation versus termination question is a purely contractual issue, and requires no *substantive* expertise from federal courts, the importance of strict fact-finding procedures in protecting the rights guaranteed under the ADA is another convincing reason for this rule. Arbitration does not carry with it the right to a trial by jury, arbitrators are not generally required to give the reasons for their decisions, the record of arbitral proceedings generally is not as complete as a trial record, judicial review of arbitration decisions is more limited than review of district court proceedings, the Federal Rules of Evidence and of Civil Procedure do not apply, and other rights such as testimony under oath, cross-examination, discovery, and compulsory process are restricted. *Id.* at 57-58. When an employee such as Nance seeks to vindicate her federal rights to be free from discrimination, we must review all factual issues—including contractual ones—de novo in order to ensure that "the interests of the individual employee [are not] subordinated to the collective interests of all employees in the bargaining unit." *Id.* at 58 n.19; *see also Barrentine*, 450 U.S. at 742-43. In short, where suits are tried is often as important as the substantive rights sought to be vindicated. Thus, whether the arbitration is "similar to, or duplicative of, the substantive rights secured by [the ADA]," *Alexander*, 415 U.S. at 54, if a plaintiff does not expressly waive her right to bring claims in federal court, a prior arbitration does not preclude us from reconsidering all factual issues underlying a statutory claim.

One final point: although we review Nance's ADA claim de novo, we do not read *Alexander* as precluding courts from considering a prior arbitration as a factor in their calculus. Indeed, a district court may admit an

arbitrator's decision as evidence based on "the degree of procedural fairness in the arbitral forum, adequacy of the record with respect to the issue of discrimination, and the special competence of particular arbitrators," or when "the issue is solely one of fact, specifically addressed by the parties and decided by the arbitrator on the basis of an adequate record." *Id.* at 60 n.21.[3]

B.

Before moving on to consider the merits of Nance's ADA claim, we pause to address the arguments set forth in the concurring opinion.

First, the concurrence disputes the proposition that Supreme Court precedent forbids us from applying collateral estoppel to issues decided by an arbitrator while interpreting a collective bargaining agreement. The concurrence accuses us of overgeneralizing and mischaracterizing the Supreme Court's rulings. To the contrary, all we have done is follow exactly what the Supreme Court has said. In *Alexander*, the Court

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[3] The concurring opinion questions the "admissibility [of the arbitrator's decision] in this case on an evidentiary basis, as this 'evidence' is almost certainly hearsay." Concurring Op. at 19. Assuming that the Supreme Court failed to consider this issue, an assumption we find dubious since the Court approved of this approach after the enactment of the Federal Rules of Evidence, *McDonald*, 466 U.S. at 292 n.13, this hardly seems to be an argument in favor of giving a prior arbitration preclusive effect. If arbitration presents serious reliability problems from the use of hearsay, then the trial court should be able to accept or reject that evidence based on the degree of procedural fairness in the arbitral forum. *See Jackson v. Bunge Corp.*, 40 F.3d 239, 246 (7th Cir. 1994); *Perry v. Larson*, 794 F.2d 279, 284-85 (7th Cir. 1986).

noted that "[t]he policy reasons for rejecting the doctrines of election of remedies and waiver in the context of Title VII are equally applicable to the doctrines of res judicata *and collateral estoppel*." 415 U.S. at 49 n.10 (emphasis added). In *McDonald*, the Court reiterated and extended its reasoning in *Alexander* and *Barrentine* to the § 1983 context. The *McDonald* Court held "that in a § 1983 action, a federal court should not afford res judicata *or collateral-estoppel* to effect an award in an arbitration proceeding brought pursuant to the terms of a collective-bargaining agreement." 466 U.S. at 292 (emphasis added). Our sister circuits have read the Supreme Court's language just as we have, presumably because it is clear and unambiguous. *See, e.g.*, *Wiedemann v. City of Oklahoma City*, 76 F. App'x 931, 932 (10th Cir. 2003) (declining to give preclusive effect to an arbitrator's determination that the defendant failed to proffer a legitimate, non-discriminatory reason for terminating plaintiffs, and citing *McDonald* in support); *Grappe v. Kansas City S. Ry. Co.*, 71 F. App'x 302, 303 (5th Cir. 2003) ("[B]ecause different policies underlie the proceedings before the Board and the Title VII action before the court, collateral estoppel is not available."); *Williams v. Perry*, No. 00-7366, 2000 WL 1506086, at *5-7 (2d Cir. Oct. 6, 2000) (declining to give preclusive effect to an arbitrator's finding that the plaintiff was discharged for "just cause" on the basis of *McDonald*); *Wilmington v. J.I. Case Co.*, 793 F.2d 909, 918 (8th Cir. 1986) (holding that an arbitrator's ruling that the plaintiff had been fired for just cause for falsifying labor cards did not have preclusive effect on a subsequently filed § 1981 claim); *Gonzalez v. S. Pacific Transp. Co.*, 773 F.2d 637, 643 (5th Cir. 1985) ("Even if the same claim and factual allegations were

determined by binding arbitration, the plaintiff is entitled to *de novo* review in a federal court and doctrines of *res judicata* or collateral estoppel are inapplicable."); *Aleem v. Gen. Felt Indus., Inc.*, 661 F.2d 135, 137 (9th Cir. 1981) ("Collateral estoppel is equally inapplicable, for Congress in enacting Title VII made it clear that prior administrative adjudications were not to prevent de novo review of Title VII claims in federal court. The statutory scheme warrants an exception to the usual rules of res judicata and collateral estoppel."); *Lyght v. Ford Motor Co.*, 643 F.2d 435, 438 (6th Cir. 1981) ("It is settled law that the doctrines of res judicata, collateral estoppel and election of remedies normally do not apply in Title VII actions.").

The concurrence is, of course, free to make what it will of Supreme Court precedent, but we think it prudent to follow that precedent, just as our sister circuits have, until the Court commands otherwise. *United States v. Hill*, 440 F.3d 292, 299 n.3 (6th Cir. 2006) (stating that the lower federal courts must apply Supreme Court precedent, even if they have doubts about its continuing viability, because it is the prerogative of the Supreme Court alone to reverse its decisions). We also cannot help but to notice that even though the concurrence insists that the Supreme Court has not foreclosed the application of collateral estoppel to issues decided by an arbitrator in a subsequent civil-rights action, the concurrence does not cite a single decision from any court doing just that. The reason for this is simple: there are none.

Even if there were some reason to assume that the Supreme Court did not mean what it said in *Alexander* and *McDonald*, we are not persuaded by the

concurrence's arguments in support of its position. The concurrence contends that if we fail to defer to an arbitrator's interpretation of a collective bargaining agreement, we risk unleashing the evil of collateral attacks on prior judgments, and the inconsistent rulings and advisory opinions that such collateral attacks could spawn. To illustrate, the concurrence asks us to imagine what would happen if Nance appealed the arbitral decision against her, we affirmed, and Nance then filed her ADA action. The concurrence says that in such a situation, our failure to give preclusive effect to the arbitrator's finding that Nance resigned without notice would effectively authorize a collateral attack on our prior (imaginary) decision affirming the arbitral decision. This, in turn, says the concurrence, would render our prior decision merely advisory.

We think our concurring colleague is unnecessarily alarmed. To believe that our opinion today will license collateral attacks as the concurrence fears, one would have to believe that the question presented on appeal from an arbitrator's decision interpreting a collective bargaining agreement, and the question presented on appeal from a district court's decision adjudicating a civil-rights claim, are identical. But as *Alexander* and its progeny have explained in no uncertain terms, they are not. Indeed, claims predicated on a collective bargaining agreement and claims predicated on federal statutes "have legally independent origins," *Alexander*, 415 U.S. at 52, and the "separate nature of these contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual occurrence," *id.* at 50. The point is that the two claims are distinct and our review of them is distinct. In an appeal from an arbitrator's decision

interpreting a collective bargaining agreement, our review is confined to ascertaining whether the arbitrator erred. In doing so, we apply the highly deferential standard of *Michigan Family Resources* and uphold the arbitrator's decision so long as she was "arguably construing or applying the contract" and was not disqualified by fraud or a conflict of interest. *Michigan Family Res., Inc. v. Serv. Employees Int'l Union*, 475 F.3d 746, 753 (6th Cir. 2007). On the other hand, in a civil-rights action in which the district court has granted summary judgment, our review is plenary. We consider de novo the district court's application of the law to the facts. *See, e.g.*, *DiCarlo v. Potter*, 358 F.3d 408, 414 (6th Cir. 2004).

Thus, the concurrence's argument confuses apples with oranges. There can be no risk of collateral attacks or inconsistent judgments because the two judgments at issue—the one involving the correctness of the arbitrator's decision interpreting the collective-bargaining agreement and the one involving the correctness of the district court's decision granting or denying relief on the employee's civil-rights claims—have nothing to do with one another. Applied to the facts here, were we to decide that Nance was indeed "terminated" for purposes of her ADA claim, that conclusion would in no way invalidate an earlier (but non-existent in this case) decision of this Court affirming the arbitrator's finding that she was *not* terminated within the meaning of the collective-bargaining agreement. This is true because the questions presented in each appeal, and the legal standards by which they are evaluated, are completely different.

This brings us to our final, and most important, disagreement with our concurring colleague. We take the concurring opinion at its word when it says that its purpose in writing separately is to present an adjudicative approach that "affords all of our precedent its due respect." Concurring Op. at 17. Rather than accomplishing this worthy goal, however, we think that the concurrence's preferred approach elevates the importance of our decision in *Michigan Family Resources* and gives short-shrift to more pertinent Supreme Court precedent.[4]

As described above, *Michigan Family Resources* sets the standard for reviewing arbitral decisions enforcing collective bargaining agreements, and it sets a very deferential standard at that. We are bound to affirm an arbitrator's decision so long as we conclude that she was "arguably construing or applying the contract." 475 F.3d at 753. Our affirmance is required even when we believe that "the arbitrator made 'serious,' 'improvident' or 'silly' errors in resolving the merits of the dispute." *Id.* In crafting the "arguably construing" inquiry, we acknowledged that this standard would allow a court to vacate "only the most egregious [arbitral] awards." *Id.*

The concurring opinion would have us import the *Michigan Family Resources* test into our consideration of federal civil-rights claims, an approach that, by our count, has been adopted by no other court. Here, even

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[4] Not once did the court in *Michigan Family Resources* cite to *Alexander*, *McDonald*, *Barretine*, or any other case dealing with the effect of a prior arbitration on statutory rights. Nor do the words "civil-rights," "statutory rights," or "collateral estoppel" even appear in the opinion.

if we concluded that the arbitrator's finding that Nance was not terminated within the meaning of the CBA was "improvident," "silly," or just plain wrong, we would nonetheless be compelled to defer to it (assuming the "arguably construing" standard was satisfied). This in turn would put an end to Nance's ADA claim.

The problem with this reasoning is that it turns Supreme Court precedent on its head. The whole point of *Alexander* and its progeny is to ensure that the federal courts' ability to decide federal civil-rights claims—even those that grow out of the same facts as the claims submitted to labor arbitration proceedings—are not controlled or handicapped by what happens in the arbitral forum. Rather than observing this strict separation, and protecting the authority of the federal courts, our concurring colleague would intertwine the two proceedings, making federal judges' consideration of the merits of civil-rights claims dependent upon an arbitrator's interpretation of the collective bargaining agreement.

The danger of this approach to the enforcement of federal civil-rights laws has already been contemplated by the Supreme Court. The Court has repeatedly emphasized that an arbitrator's duty is to effectuate the intent of the parties by interpreting the collective bargaining agreement, and that she has no other authority outside of the contract. *See Barrentine*, 450 U.S. at 744. Thus, even if a proper interpretation of the contract would contradict federal law, the arbitrator must give effect to the contract. *See id.* (An arbitrator "has no general authority to invoke public laws that conflict with the bargain between the parties.") (citing *Alexander*, 415 U.S. at 53). The result

is that an arbitrator "may issue a ruling that is inimical to the public policies underlying [federal law], thus depriving an employee of protected statutory rights." *Id.*

The concurrence disregards this possibility, and in so doing fails to give *Alexander* and its progeny their "due respect." By endorsing a rule that requires us to give preclusive effect to an arbitrator's contractual interpretations that satisfy the *Michigan Family Resources* standard, our concurring colleague is in effect saying that even if the arbitrator's conclusion is opposite to the conclusion we would reach in presiding over a federal civil-rights action or, worse yet, even if the arbitrator's conclusion is contrary to federal law, we are nonetheless bound to defer to it. We do not share the concurrence's peculiar reading of precedent, nor do we share its anemic view of our responsibility as federal judges to independently interpret and apply federal statutes.

C.

Although the district court incorrectly concluded that Nance was barred from bringing her ADA and related claims in federal court and declined to address the merits of her ADA claim, our review of the record makes clear that summary judgment for Goodyear is still appropriate. *Dobbs-Weinstein v. Vanderbilt Univ.*, 185 F.3d 542, 545 n.2 (6th Cir. 1999) (holding that this Court may affirm the judgment of the district court on any grounds supported by the record, even if they are different from those relied upon by the district court).

The ADA provides that "[n]o covered entity shall discriminate against a qualified individual with a

disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a).[5] Nance makes three distinct claims of discrimination: (1) she was terminated because of her disability; (2) she was constructively discharged because of her disability; and (3) she was not given reasonable accommodations as required by the ADA. Each will be considered in turn.

1.

To prevail in a disability discrimination case, a plaintiff must show: (1) she was "disabled" under the ADA; (2) she was otherwise qualified to perform the essential functions of the job, with or without reasonable accommodations; (3) she suffered an adverse employment action; (4) the employer knew or had reason to know of the plaintiff's disability; and (5) a nondisabled person replaced her. *Monette v. Elec. Data Sys. Corp.*, 90 F.3d 1173, 1186 (6th Cir. 1996). Nance attempts to meet this burden by presenting inferential evidence of discrimination, requiring us to apply the familiar *McDonnell Douglas* burden-shifting framework. Once the plaintiff establishes a prima facie case of discrimination, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for the adverse employment action. *Id.* If the defendant does so, the plaintiff must identify evidence

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[5] Both federal and Tennessee disability discrimination actions require the same analysis. *Barnes v. Goodyear Tire & Rubber Co.*, 48 S.W.3d 698, 705 (Tenn. 2000).

from which a reasonable jury could conclude that the proffered reason is actually a pretext for unlawful discrimination. *Id.* Although the burdens of production shift, "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Tex Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981). "On a motion for summary judgment, [this Court] considers whether there is sufficient evidence to create a genuine dispute at each stage of the *McDonnell Douglas* inquiry." *Cline v. Catholic Diocese of Toledo*, 206 F.3d 651, 661 (6th Cir. 2000).

Nance cannot show that she suffered an adverse employment action, and thus has not established a prima facie case of discrimination. Under Article X(c) of the CBA, an employee who is absent for seven scheduled work days or more, without calling in to Goodyear explaining the reasons for her absence, is considered to have resigned without notice. Although this section technically applies to "absences without leave," Article X(b)(1) of the CBA also states that "an employee who has been placed on the 'Employment Roll,'" or medical leave, "continues to be responsible to report off directly to his resident department." (JA 294-95.) Moreover, even if there is a strict textual question of whether the CBA subjects employees on medical leave to the same seven-day requirement, it is undisputed that the contract has been universally interpreted in such a manner. At Nance's workers' compensation proceeding, Lance Jackson, a manufacturing team specialist at Goodyear, testified to the requirements to call in while on medical leave:

> "[W]e have got various numbers, they call off and report off daily until they get doctor's coverage where they can report off once a week and some people report off daily at first and then they go to once a week. They usually report either to myself or to a call off phone."

(JA 533.) Jackson's testimony was unrebutted.

Furthermore, Nance was aware of these requirements. As a result of her initial injury, between April 19, 2002 and May 10, 2002, Nance took leave from work and "reported off" for several weeks, but initially failed to document the reasons for her absences. By letter of May 10, 2002, Goodyear told her that she must continue to document the reason for her absence from work or else jeopardize her employment under the provisions of the CBA. Thus, she was on notice that Article X(c) applied not only to employees who are absent, but also to employees who are on medical leave. Goodyear confirmed this fact when Human Resources representative Hill sent Nance a letter, which Nance admits receiving, advising Nance that she was being placed on medical leave of absence. The letter reminded Nance that she is still "responsible for reporting off to [her] resident department." (JA 284.) Indeed, Nance admits that prior to the termination of her employment relationship, she understood these very requirements.

Nance argues that Goodyear failed to follow company procedure in determining that she resigned without notice. In particular, she contends that Goodyear should have sent her a letter notifying her that she had failed to report in and given her a two day "cool-off" period before officially ending the

employment relationship. Although it is true that Nance did not receive either a written warning, a two-day suspension, or a notification that she would be terminated if she failed to "report in," these procedural protections only apply when Goodyear is terminating an employee *for cause* under its disciplinary policy, not when an employee is deemed to have resigned without notice. If an employee is on approved medical leave of absence, and fails to report in for a period of seven days, the terms of the CBA are explicit: the employee is considered to have resigned without notice. And when an employee voluntarily resigns, she cannot claim that she suffered an adverse employment decision under the ADA. *See Hammon v. DHL Airways, Inc.*, 165 F.3d 441, 447 (6th Cir. 1999).

Nance also argues that other employees on medical leave were not subject to the strict seven-day time-frame to report in. While testimony supports the contention that employees on medical leave did not have to call in every day, there is no evidence from the record that similarly situated employees were not required to report their absences altogether. Indeed, the facts of this particular case require us to place the fault directly on Nance. After Hill sent the January 8, 2004 letter reminding Nance of her obligation to call in on a regular basis, Nance did not return to work, nor did she call in to report her absences. A few weeks later, McClure, then Goodyear's business center auditor for the plant's Banbury area, called Nance at her home on January 29 and 30, 2004 to inquire about her absence. The first time he left a voice message which Nance said she did not receive. On January 30, he reached her by telephone, but Nance "told him [she] could not talk to him . . . [a]nd [] hung up the phone." (JA 224.) It appears that Goodyear made a good faith

effort to give Nance an opportunity to explain her absenteeism. There is nothing in the record for us to conclude that anything more—e.g., a written notice, review board, or two-day suspension—should have been required.

Finally, according to the factors listed in *Alexander*, Nance's prior arbitration resolves any ambiguity in favor of Goodyear. First, the hearing appeared to be procedurally adequate. Though Nance claims she was not represented by counsel, the record indicates that both Union representatives and a Union attorney appeared on her behalf, and that she was afforded an opportunity to present evidence, cross-examine witnesses called by Goodyear, and offer arguments in support of her position. And while the arbitral determination failed to give any consideration to Nance's ADA claims, the issue in dispute was "solely one of fact, specifically addressed by the parties and decided by the arbitrator on the basis of an adequate record." *Alexander*, 415 U.S. at 60 n.21.

2.

Nance contends that she was "constructively discharged" and thus subject to an adverse employment action when Goodyear forced her to work without a safety gate and under poor lighting. "To maintain an action for constructive discharge . . . , [Nance] must show that 'working conditions would have been so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign.'" *Neilley v. State Farm Ins. Co.*, No. 98-2114, 1999 WL 1281717, at *6 (6th Cir. Dec. 29, 1999) (quoting *Kocsis v. Multi-Care Mgmt., Inc.*, 97 F.3d 876, 887 (6th Cir. 1996)). We have required a

plaintiff to "produce evidence of an intent to discriminate" in order to establish a constructive discharge claim. *Id.* This analysis "requires an inquiry into both the objective feelings of the employee and the intent of the employer." *Id.* (citation omitted). Thus, even if Nance can show that a reasonable person in her position might be targeted, she must also show "foreseeability on the part of the employer." *Id.*

We find no evidence that Nance's working conditions were so difficult or unpleasant that a reasonable employee would resign. Between eleven and fifteen employees occupy the machine-cleaner position at any given time, working in three shifts over a twenty-four hour period, and none have complained about either the safety gate or the lighting. Furthermore, not only did Nance admit that she failed to file a grievance concerning any of her safety concerns, but she also quit after only four days of work. It would be difficult for Goodyear, through its supervisory personnel, to foresee that Nance would feel constructively discharged in such a short period of time.

The record is also barren of any evidence that Goodyear placed her in the machine-cleaner position with the intent to force her into resigning. The machine cleaner is an established bargaining-unit position that pays nearly the same as her previous job as a stock trucker. Even if we assume that the machine-cleaner position is less desirable than some other jobs, an assumption that Nance has not established, Goodyear did not violate the ADA by transferring Nance to that position. *Burns v. Coca-Cola Enter., Inc.*, 222 F.3d 247, 258 (6th Cir. 2000) ("Allowing [plaintiff] to recover despite his failure to

abide by [defendant's] non-discriminatory policy requiring him to apply for a transfer to a new position within his restrictions would convert a nondiscrimination statute into a mandatory preference statute, a result which would be inconsistent with the nondiscriminatory aims of the ADA. ") (citation omitted).

3.

Because we have determined that, under the provisions of her contract with Goodyear, Nance effectively resigned by not reporting in, it is not necessary to address the rest of her ADA claims. *Hammon*, 165 F.3d at 447; *see also EEOC v. United Parcel Serv., Inc.*, 249 F.3d 557, 563 (6th Cir. 2001) (per curiam).

However, even if we were to address Nance's arguments that she did not receive the required reasonable accommodations under the ADA, they are meritless. The ADA defines "discrimination" to include "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability." 42 U.S.C. § 12112(b)(5)(A). The Act further defines "reasonable accommodation" to include:

> (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
> (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, trainir.g

> materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

Id. § 12111(9).

The ADA's regulations indicate that, "[t]o determine the appropriate reasonable accommodation it may be necessary for the [employer] to initiate an informal, interactive process with the qualified individual with a disability in need of accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations." 29 C.F.R. § 1630.2(o)(3). "Even though the interactive process is not described in the statute's text, the interactive process is mandatory, and both parties have a duty to participate in good faith." *Kleiber v. Honda of Am. Mfg., Inc.*, 485 F.3d 862, 871 (6th Cir. 2007).

Nance alleges that Goodyear failed reasonably to accommodate her in the following ways: (1) It did not provide her with a safety bar and adequate lighting at the machine-cleaner position; (2) It did not provide her reasonable accommodations for the stock-trucker position; (3) It generally acted in bad faith.

First, Nance provides no evidence that both the safety bar and lighting were necessary accommodations in light of her physical limitations. Nor does Nance show that she could not, because of her disability, meet the demands of the machine-cleaner position. Admittedly the tools that Goodyear gave Nance, which included a hand-held scoop made

from a coffee can and two teflon pans, appear crude. But however crude these tools might be, they were officially recommended by Goodyear's physical therapist, Gilliam. In any event, Nance does not dispute their effectiveness.

Moreover, the record shows that Goodyear met with Nance, her Union representative, and Gilliam to review lists of jobs at the plant in an effort to match her lifting restrictions with the jobs' physical requirements. After initially placing her in the stock-trucking position, Nance removed herself from that position because of neck and shoulder pain. Nance was officially medically disqualified from that job in a meeting where she and her Union representative were present. Outside of Nance's general allegations, there is simply no specific evidence that Goodyear participated in these meetings in bad faith. *See Kleiber*, 485 F.3d at 871 ("When a party obstructs the process or otherwise fails to participate in good faith, courts should attempt to isolate the cause of the breakdown and then assign responsibility.") (citation omitted). Finally, even if Goodyear could modify the stock-trucking position, the ADA explicitly includes "reassignment to a vacant position" as a reasonable accommodation. As such, Nance's transfer to the machine-cleaner position could in no way be construed as a violation of the ADA.

It is not entirely clear whether Nance is also arguing that she was denied another job at Goodyear for which she was qualified. Nevertheless, to overcome summary judgment, the plaintiff generally must identify the specific job she seeks and demonstrate that she is qualified for that position. *Burns*, 222 F.3d

at 258-59. Because she has failed to meet her burden in all respects, summary judgment is appropriate.

IV. FMLA CLAIMS

Nance further alleges that she is qualified for FMLA leave. The FMLA entitles eligible employees to twelve weeks of unpaid leave during any twelve-month period for certain statutorily prescribed reasons. 29 U.S.C. § 2612(a)(1). The FMLA defines the term "eligible employee" as:

> [A]n employee who has been employed--
> (i) for at least 12 months by the employer with respect to whom leave is requested under section 2612 of this title; and
> (ii) for at least 1,250 hours of service with such employer during the previous 12-month period.

29 U.S.C. § 2611(2)(A).

It is undisputed that Nance actually worked only 374 hours, well below the 1250-hour threshold she needed to qualify under the FMLA. However, Nance appears to argue that her post-termination hours should count toward the FMLA calculation, and points to this Court's decision in *Ricco v. Potter*, 377 F.3d 599, 605 (6th Cir. 2004), for support. In *Ricco*, this Court created an exception for "hours that the employee wanted to work but was *unlawfully prevented* by the employer from" doing so. *Id.* (emphasis in original). It explicitly distinguished time that an employee does not work due to unlawful termination from failure to work due to vacation or illness. *Id.* Since we have already determined that Nance resigned without notice, and was not unlawfully terminated, she does not meet the

hours requirement, and so she is not qualified for relief under the FMLA.

V. RETALIATORY DISCHARGE AND WHISTLEBLOWER CLAIMS

Nance appears to argue that Goodyear terminated her for "reporting dangerous working conditions" in violation of the Tennessee Public Protection Act, also known as the Whistleblower Law, Tenn. Code Ann. § 50-1-304(a), but fails to cite either statute in her appellate brief or develop the argument with specificity. Accordingly, her argument is waived. *See Indeck Energy Serv., Inc. v. Consumer Energy Co.*, 250 F.3d 972, 979 (6th Cir. 2000) ("[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived . . . .") (citation omitted). Even if we were to consider this argument, to make a prima facie case of retaliatory discharge under the Act, the employee must prove that she was actually discharged. *Guy v. Mutual of Omaha Ins. Co.*, 79 S.W.3d 528, 535 (Tenn. 2002). For the reasons set forth above, Nance has not met this requirement.

VI. OUTRAGEOUS CONDUCT AND BREACH OF DUTY OF GOOD FAITH AND FAIR DEALING CLAIMS

Neither of these arguments is developed with sufficient specificity, and therefore each is waived. Nevertheless, these claims are also meritless. To prove "outrageous conduct," a plaintiff must show that the defendant's conduct "has been so outrageous in character, and so extreme in degree, as to go beyond all bounds of decency, and to be regarded as atrocious

and utterly intolerable in a civilized community." *Bain v. Wells*, 936 S.W.2d 618, 623(Tenn. 1997) (citation omitted). Moreover, the duty of good faith and fair dealing "requires a contracting party to do nothing that will have the effect of impairing or destroying the rights of the other party to receive the benefits of the contract." *Elliott v. Elliott*, 149 S.W.3d 77, 85 (Tenn. Ct. App. 2004). Nance bases both these claims on the allegation that Goodyear placed her in a dangerous workplace condition and terminated her illegally. Because we find that Nance resigned without notice pursuant to the terms of her contract, and that Goodyear did not subject Nance to unfair working conditions, Goodyear cannot be held liable under either of these claims.

VII. CONCLUSION

In sum, Nance has not raised a genuine issue of material fact as to any of her claims. Accordingly, we **AFFIRM** the judgment of the district court.

CONCURRENCE

ALICE M. BATCHELDER, Circuit Judge, concurring. I concur in the outcome and part of the analysis, but write separately because I do not agree that we are entitled to conduct a plenary re-interpretation or application of the collective bargaining agreement (CBA), as the lead opinion does in Sections III.A and III.C.1. Therefore, I cannot join the lead opinion's statement that "we have determined that, under the provisions of her contract with Goodyear, Nance effectively resigned by not reporting in." Put simply, I do not believe that this determination on the meaning or application of the

CBA is ours to make. I also disagree with Section III.B, which mischaracterizes my position.

I.

I agree that *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), disallows the use of claim preclusion (*res judicata*) to bar Ms. Nance's action from federal court. Indeed, "[t]here is no suggestion in the statutory scheme that a prior arbitral decision either forecloses an individual's right to sue or divests federal courts of jurisdiction." *Id.* at 47. But, I do not agree that *Alexander* and its progeny disallow the use of issue preclusion (collateral estoppel) to bar the re-litigation of *any* issue raised anew in the subsequent action. Specifically, I do not agree that *Alexander* or its progeny explicitly disallow the use of issue preclusion to bar the re-litigation of an issue that is solely dependent on an interpretation or application of the CBA (such as the resignation-under-the-CBA issue in this case) and, hence, otherwise specifically committed to the expertise of the arbitrator. *See Alexander*, 415 U.S. at 53-54 ("Thus the arbitrator has authority to resolve only questions of contractual rights, and this authority remains regardless of whether certain contractual rights are similar to, or duplicative of, the substantive rights secured by Title VII."); *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 737 (1981) ("While courts should defer to an arbitral decision where the employee's claim is based on rights arising out of the collective-bargaining agreement, different considerations apply where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers."); *Wright v. Univ. Maritime Serv. Corp.*, 525 U.S. 70, 78-79 (1998) ("That

presumption [favoring arbitration of contractual disputes] does not extend beyond the reach of the principal rationale that justifies it, which is that arbitrators are in a better position than courts to interpret the terms of a CBA."). Having said that, however, I am not inclined to hold that an arbitrator's decision, standing on its own, should necessarily receive preclusive effect. If the arbitrator's decision had been appealed and we were instead confronted with a prior decision from this court, my opinion might be different. *See McDonald v. City of West Branch*, 466 U.S. 284, 288 (1984).

To be sure, *Alexander*, 415 U.S. 50-54, holds that, based on the same underlying facts and circumstances, a plaintiff may have a remedy based on either a contractual right or a statutory right, without necessarily having a remedy based on both (i.e., the absence of a remedy based on one does not foreclose a plaintiff's right to seek, and receive, relief based on the other). Specifically, *Alexander* holds that an arbitrator's decision that an employer did not violate the nondiscrimination clause of its CBA (i.e., the contractual right) does not preclude that employee from seeking a decision from a federal court that the very same conduct does violate Title VII (i.e., a statutory right). The analogous construct in the present case would be that the arbitrator's decision that Goodyear did not terminate Ms. Nance under the terms of Article X of its CBA does not preclude Ms. Nance from seeking a decision from the federal court that the very same conduct does constitute "termination" without regard to the CBA, i.e., under a federal statute. But that is not what the lead opinion says here. The lead opinion says that Ms. Nance has a right to have a federal court decide whether Goodyear

terminated her under the CBA based on the court's re-interpretation and re-application of Article X of the Goodyear CBA. The broader implication — and, presumably, the intention — of this assertion is that a plaintiff has a right to a federal-court re-determination of *any* finding, even those that are entirely dependent on the terms of the CBA (and the expertise of the arbitrator).

Not only is this assertion inconsistent with *Alexander*, 415 U.S. at 53-54, *Barrentine*, 450 U.S. at 737, and *Wright*, 525 U.S. at 78-79, as were cited in the foregoing paragraph, it would also empower a plaintiff to collaterally attack even an express holding of a prior panel of this court. Suppose Ms. Nance had appealed the arbitrator's decision that she had resigned— a decision based entirely on the arbitrator's application of Article X of the CBA. And suppose a panel of this court had affirmed that decision. If it is true, as the lead opinion asserts, that Ms. Nance could thereafter re-litigate that same issue (i.e., the proper interpretation and application of Article X of the CBA, in regard to whether she resigned) under the auspices of a civil rights action, then the prior panel's holding on that issue would be nothing more than an advisory opinion. I submit that, because we have no authority to render advisory opinions, *see Sierra Club v. Morton*, 405 U.S. 727, 732 n.3 (1972), our ability to hear appeals from arbitrators' decisions is henceforth in doubt.

This brings me to my second point. If, as I have hypothesized, the parties had appealed the arbitrator's decision directly, we would not have reviewed that decision *de novo*. On direct appeal, we would have reviewed that decision under the deferential standard

that we recently set out in *Michigan Family Resources, Inc. v. Service Employees International Union*, 475 F.3d 746, 753 (6th Cir. 2007) (en banc) (confining our review of an arbitrator's decision to: (1) whether the dispute was committed to arbitration; (2) whether the arbitrator was, at least arguably, construing or applying the contract to resolve the dispute; and (3) whether the decision was tainted by any "procedural aberration," such as fraud, conflict of interest, or dishonesty). Consequently, if the parties had appealed the arbitrator's decision directly and we had before us a prior, judicial decision from a panel of this court, then I believe we would now face a different question regarding issue preclusion.

Since the arbitrator's decision in this case was not appealed, however, we are not confronted with a prior decision from a panel of this court, but only a prior decision from an arbitrator, albeit a decision on an issue that is indisputably entirely dependent on an interpretation or application of a term in the CBA and, hence, otherwise specifically committed to the expertise of the arbitrator. From an issue preclusion standpoint, I read *Alexander* and its progeny as prescribing *de novo* review of disputes and questions concerning interpretation or application of federal statutes, regardless of the contract, but not disputes and questions concerning only interpretation or application of the contract or CBA. *See Alexander*, 415 U.S. at 56 ("Arbitral procedures, while well suited to the resolution of contractual disputes, make arbitration a comparatively inappropriate forum for the final resolution of rights created by Title VII."). Therefore, I believe that, by conducting a *de novo* review of the meaning and applicability of Article X of the Goodyear CBA with respect to the resignation-as-

determined-by-the-CBA question, we have allowed a plaintiff to collaterally attack the arbitrator's decision in a way that contradicts our *Michigan Family Resources* precedent, merely by filing a statutory-rights-based claim in federal court, regardless of its merit,[1] and thus, to circumvent the deferential standard of *Michigan Family Resources* on an issue that is purely contractual.

To repeat, I simply do not believe that we are entitled to interpret or apply the contract *de novo* in this context, when we could not do so on direct review. I believe the proper approach to this type of situation — one which reconciles *Alexander* and *Michigan Family Resources* — is to review an arbitrator's decision on a purely contractual claim under the *Michigan Family Resources* standard, and review statutory-rights-based claims under a *de novo* standard, in accordance with *Alexander*. I believe this fits the case law and affords all of our precedent its due respect.

II.

The lead opinion fails to rebut my explanation of *Alexander* and my practical reconciliation of *Alexander* with *Michigan Family Resources*. Its contention that the present case cannot be distinguished from *Alexander* relies on a mischaracterization of

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[1] One need look no further than Section III.C.1. of the lead opinion, which contains a detailed inquiry into the interpretation and application of Article X of the Goodyear CBA, even though the arbitrator had already resolved this issue definitively, and even though the lead opinion ultimately concludes that Ms. Nance's claims lack merit.

Alexander's premise as a purely contractual question of whether Mr. Alexander's employer had "just cause" for firing him under the terms of the CBA, which the lead opinion equates to the question of whether Ms. Nance "resigned." But, in actuality, the Supreme Court framed *Alexander* as follows:

> The District Court granted respondent's motion for summary judgment and dismissed the action. The court found that the *claim of racial discrimination* had been submitted to the arbitrator and resolved adversely to petitioner. It then held that petitioner, having voluntarily elected to pursue his grievance to final arbitration under the *nondiscrimination clause of the collective-bargaining agreement*, was bound by the arbitral decision and thereby precluded from suing his employer under Title VII. The Court of Appeals for the Tenth Circuit affirmed per curiam on the basis of the District Court's opinion. We granted petitioner's application for certiorari.

Alexander, 415 U.S. at 43 (citations, footnote, and paragraph break omitted; emphasis added). Thus, in *Alexander*, the arbitrator resolved a "claim of racial discrimination" under the "nondiscrimination clause of the [CBA]," even though discrimination is a matter of federal statutory law and not the type of issue properly bargained away in a CBA or for determination by a labor arbitrator; whereas the arbitrator in the present case resolved a claim that Ms. Nance had resigned when she failed to call in, as prescribed by the terms of the Goodyear CBA, which is exactly the type of issue properly relegated to collective bargaining, and hence, appropriately determined by an arbitrator.

Indeed, the whole point of *Alexander* was that the issue to be resolved — the "claim of racial discrimination" under the "nondiscrimination clause of the [CBA]" — was the type of issue committed to federal statute and to determination by a federal court, not the type of issue properly relegated to a CBA or to determination by a labor arbitrator. Thus, the lead opinion's contention that the present case cannot be distinguished from *Alexander* is unpersuasive, inasmuch as the point of *Alexander* was to draw this very distinction: some issues are properly submitted to federal courts (i.e., federally protected rights), while other issues are properly submitted to labor arbitrators.

The lead opinion asserts that "*Alexander* and its progeny" expressly provide for a dissatisfied employee to collaterally attack an arbitrator's decision in a way that otherwise contradicts *Michigan Family Resources*. This argument is specious. The lead opinion cites four Supreme Court cases[2] and eight Circuit Court cases,[3] but not one of those cases does what the lead opinion does here — re-interpret the CBA and apply it to the facts of the case to reach its decision. In short, the lead

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[2] *Wright*, 525 U.S. at 70; *McDonald*, 466 U.S. at 284; *Barrentine*, 450 U.S. at 728; *Alexander*, 415 U.S. at 36.

[3] *Wilmington v. J.I. Case Co.*, 793 F.2d 909, 918 (8th Cir. 1986); *Gonzalez v. S. Pacific Transp. Co.*, 773 F.2d 637, 643 (5th Cir. 1985); *Becton v. Detroit Terminal of Consol. Freightways*, 687 F.2d 140, 141-42 (6th Cir. 1982); *Aleem v. Gen. Felt Indus., Inc.*, 661 F.2d 135, 137 (9th Cir. 1981); *Lyght v. Ford Motor Co.*, 643 F.2d 435, 438 (6th Cir. 1981); *Wiedemann v. Oklahoma City*, 76 F. App'x 931, 932 (10th Cir. 2003); *Grappe v. Kansas City S. R.R.*, 71 F. App'x 302, 303 (5th Cir. 2003); *Williams v. Perry*, No. 00-7366, 2000 WL 1506086, at *5-7 (2d Cir. Oct. 6, 2000).

opinion offers no controlling precedent to justify its approach.

Not only is there no controlling precedent to justify this approach, there is no reason behind it either. There is no good reason to create a system in which a dissatisfied employee is allowed to collaterally attack an arbitrator's decision in a way that contradicts our established precedent, or that might well lead to contradictory results from two panels of this court in a case arising from common circumstances, involving the same parties, and concerning the identical issue. Hence, the lead opinion's only recourse is to argue that *Alexander* and its progeny represent a sweeping proclamation by the Supreme Court disallowing the use of issue preclusion (collateral estoppel) to bar the re-litigation of *any* issue raised anew in the subsequent action (thereby expressly allowing collateral attack and the possibility of inconsistent judgments). But, the lead opinion does not explain *why* the Supreme Court (or any court) would do this, when courts go to such lengths to avoid these consequences in every other aspect of the law. The simple answer is that it would not.

The fact is that the Supreme Court did draw a distinction — between those issues to be resolved under a CBA (by an arbitrator) and those issues to be resolved under federal law (by a court). The lead opinion — apparently recognizing my point — proclaims that: "whether [Ms.] Nance resigned without notice might mean one thing under Goodyear's CBA, but it might very well mean an entirely different thing for the purposes of an 'adverse employment action' under the ADA." Having said this, however, the lead opinion fails to realize what it had said just one

sentence earlier (and what I have been saying all along) — "While the expertise of arbitrators lies in the application of facts to the terms of an employee's contract or collective bargaining agreement, the expertise of federal courts lies in the application of facts to anti-discrimination statutes." The *arbitrator* is peculiarly qualified to decide the question of "whether [Ms.] Nance resigned . . . under Goodyear's CBA," while the *court* is peculiarly qualified to decide "whether [Ms.] Nance resigned . . . for the purposes of an 'adverse employment action' under the ADA." It is that simple.

But, after acknowledging that these are two different questions, each peculiarly suited to a decision-maker with unique expertise, the lead opinion decides to treat them the same, dismissing the arbitrator's expertise and assigning them both to review by the federal court, despite its recognized lack of expertise as to the first question. As "support" for this decision, the lead opinion offers nothing more than an itemization of the shortcomings of the arbitration process as a whole. Indeed, if the issue confronting us were whether an arbitrator's decision should be entitled to some respect or deference by a court of law, I would say this argument is a good one. But that is not the issue confronting us, and that argument does not address the issue that we do confront.

For all of the foregoing reasons, I reiterate my position that I read *Alexander* and its progeny as prescribing *de novo* review of disputes and questions concerning federal statutes, regardless of the contract, but not for disputes and questions concerning only the contract. The meaning or interpretation of the contract should be decided by the arbitrator and reviewed

pursuant to our deferential standard, as set forth in *Michigan Family Resources*, 475 F.3d at 753.

III.

Finally, even if I agreed to treat the arbitrator's decision as "merely evidence," as the lead opinion does, I would question its admissibility in this case on an evidentiary basis, as this "evidence" is almost certainly hearsay. To be sure, *Alexander*, 415 U.S. at 60, said "[t]he arbitral decision may be admitted as evidence and accorded such weight as the court deems appropriate," but *Alexander* — decided February 19, 1974 — predated the enactment of the Federal Rules of Evidence, and the *Alexander* Court was not confronted with present-day hearsay concerns. I realize that, in other post-*Alexander* scenarios, courts have admitted arbitrators' rulings as hearsay exceptions, pursuant to public records exception, Fed. R. Evid. 803(8), or the residual exception, Fed. R. Evid. 807. In such cases, the parties argued the admissibility of the particular arbitrator's decision and the district court rendered a decision pursuant to those arguments. I believe this to be the proper approach. But, here, the lead opinion disregards the hearsay aspect of the arbitrator's opinion and renders a decision that could be read in either of two ways: (1) an arbitrator's opinion is *per se* admissible, despite its hearsay character or questions of reliability or relevance; or (2) the admissibility of an arbitrator's opinion is to be determined by the factors set forth in *Alexander*, 415 U.S. at 60 fn. 21, regardless of its hearsay character. I find either of these objectionable.

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing,

offered in evidence to prove the truth of the matter asserted." Fed. R. Evid. 801. If we are to treat the arbitrator's decision as merely evidence, then that decision is almost certainly hearsay — i.e., the arbitrator's decision is a statement made by a declarant (i.e., arbitrator) who is not presently testifying, offered into evidence to prove the truth of the matter asserted (i.e., arbitrator's opinion on the matter). And, trial courts do not render *sua sponte* decisions on the admissibility of hearsay evidence; that is for the parties to raise and argue, which was never done in this case.

Finally, the lead opinion's suggestion in its footnote three that the Supreme Court "approved of this approach" in *McDonald v. City of West Branch*, 466 U.S. 284, 292 n.13 (1984), is seriously inaccurate. In footnote thirteen to *McDonald*, the Supreme Court stated: "an arbitral decision *may* be admitted as evidence" (emphasis added), and then quoted *Alexander* regarding the "weight to be accorded an arbitral decision" upon its admission. There was no discussion whatsoever of its admissibility subject to a hearsay challenge.

IV.

For all of the forgoing reasons, I concur in the judgment but not the entire analysis.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 06-6563

[Filed May 23, 2008]

MARCIA B. NANCE, Plaintiff-Appellant,	)
v.	)
THE GOODYEAR TIRE & RUBBER COMPANY, Defendant-Appellee.	)

Before: BATCHELDER, MOORE, and COLE, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court for the Western District of Tennessee at Jackson.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green
Clerk

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE EASTERN DIVISION

No. 04-1307-T-An

[Filed November 9, 2006]

MARCIA NANCE, Plaintiff,	)
v.	)
GOODYEAR TIRE AND RUBBER CO., Defendant.	)

ORDER ON PENDING MOTIONS

Plaintiff Marcia Nance filed this action, alleging claims of discrimination and retaliation in violation of the Tennessee Handicap Act ("THA"), T.C.A. § 8-50-103, and the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101 et seq.; willful violations of the Family and Medical Leave Act ("FMLA"), 28 U.S.C. §§ 2601 et seq.; (3) retaliatory discharge, including violations of T.C.A. § 50-1-304(a) and (d)(I); (4) wrongful and constructive discharge through alleged retaliatory conduct; (5) outrageous conduct/intentional infliction of emotional distress in violation of

Tennessee common law; and (6) breach of duty of good faith and fair dealing. Defendant has filed a motion for summary judgment [DE # 108], and Plaintiff has filed a response to the motion. For the reasons set forth below, Defendant's motion for summary judgment is GRANTED. Defendant's motions in limine [DE#s 166, 167, 168, 169, 170] are DENIED as moot, and Defendant's motion to continue [DE# 176] is DENIED as moot.

Motions for summary judgment are governed by Rule 56 of the Federal Rules of Civil Procedure. To prevail on a motion for summary judgment, the moving party has the burden of showing the "absence of a genuine issue of material fact as to an essential element of the nonmovant's case." *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479 (6th Cir. 1989). The moving party may support the motion with affidavits or other proof or by exposing the lack of evidence on an issue for which the nonmoving party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). The opposing party may not rest upon the pleadings but, "by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e).

"If the defendant . . . moves for summary judgment . . . based on the lack of proof of a material fact, . . . [t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). The court's function is not to weigh the evidence, judge credibility, or in any way determine the truth of the matter,

however. *Anderson*, 477 U.S. at 249. Rather, "[t]he inquiry on a summary judgment motion . . . is . . . 'whether the evidence presents a sufficient disagreement to require submission to a [trier of fact] or whether it is so one-sided that one party must prevail as a matter of law.'" *Street*, 886 F.2d at 1479 (quoting *Anderson*, 477 U.S. at 251-52). Doubts as to the existence of a genuine issue for trial are resolved against the moving party. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 158-59 (1970).

According to the complaint, Plaintiff was placed on an approved leave of absence due to a psychiatric condition which developed as a result of Defendant's refusal to take measures to ensure her workplace safety. The complaint alleges that Plaintiff was terminated while she was on medical leave. The complaint further alleges that Defendant's purported reason for terminating Plaintiff was that she did not call in her absences, but her termination was actually in retaliation for not resolving her workers compensation claim prior to trial. The complaint also alleges that Defendant discriminated against Plaintiff by terminating her because she "took time off to receive mental health treatment." Complaint at para. 19. Additionally, the complaint alleges that Plaintiff was constructively discharged when Defendant assigned Plaintiff to work in hazardous conditions.

Defendant asserts that Plaintiff's claims have already been decided by an arbitrator whose decision is final and binding on this court. Specifically, the arbitrator found that Plaintiff resigned rather than being terminated. Arb. Op. at 10-12.

The undisputed evidence is as follows. Defendant Goodyear operates a tire manufacturing plant in Union City, Tennessee. On June 22, 1998, Defendant hired Plaintiff as a bargaining unit employee in a bead builder position. Between May 26 and November 1, 1999, Plaintiff was on a medical leave of absence. Between June 4 and September 10, 2000, Plaintiff worked light duty. On November 15, 2000, Plaintiff began working as a roll changer. On February 12, 2002, Plaintiff injured her neck and shoulder while working as a roll changer and was assigned light duty work. Between April 19 and May 10, 2002, Plaintiff called in her absences. By letter of May 10, 2002, Defendant told Plaintiff to document the reason for her absence or else jeopardize her employment. On May 14, 2002, Plaintiff provided medical documentation explaining that her job-related injury caused her absences. Defendant then granted Plaintiff workers compensation leave for the period March 26 through June 16, 2002.

Plaintiff returned to work on June 16, 2003, as a stock trucker based on the input of Jacqueline Gilliam, an independent physical therapist, who conducted a complete functional capacity evaluation of Plaintiff to determine Plaintiff's ability to resume work as a roll changer. Gilliam initially concluded that Plaintiff could not physically perform any job at the plant but later identified positions that Plaintiff could perform with accommodations, such as stock trucker.

On July 23, 2003, Plaintiff called in another absence. Defendant wrote Plaintiff a letter dated July 29, 2003, stating that she must provide medical documentation to support her absence. Plaintiff provided medical documentation that she had a

hysterectomy on July 22, 2003. Defendant granted her a retroactive medical leave from July 22, 2003, to September 25, 2003, after which she returned to work. On October 3, 2003, Plaintiff was disqualified as a stock trucker based on her complaints that she had not been provided with accommodations. She was off work for one month.

On November 3, 2003, Plaintiff was assigned to a machine cleaner job with restrictions. Plaintiff's last day to work at the plant was November 6, 2003. Between November 7, 2003, and January 9, 2003, Plaintiff called in absences. By letter dated November 17, 2003, Defendant advised Plaintiff that she must document her absences or risk losing her job. On December 16, 2003, Plaintiff provided medical documentation specifying a return to work date of January 7, 2004. Defendant granted Plaintiff medical leave from November 6, 2003, to January 8, 2004.

On January 9, 2004, Plaintiff had a benefits review conference with Defendant in an attempt to resolve her workers compensation claim prior to trial, but the claim was not resolved. On January 10, 2004, Plaintiff stopped calling in to report her absences. On February 23, 2004, Defendant notified Plaintiff by letter that her failure to call in violated Article X of the collective bargaining agreement ("CBA"), (absent for more than seven days without reporting) and that Defendant considered her to have resigned without notice as of February 19, 2004.[1]

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[1] Although Plaintiff attempts to argue that she was not required to "report off" on a regular basis, *see* Response at p.2, the arbitrator specifically found that "the evidence shows that

While working for Defendant, Plaintiff was a member of the United Steelworkers of America Local 878 ("the Union").[2] On March 3, 2004, the Union filed a grievance on Plaintiff's behalf, disputing her termination. Pursuant to the CBA, the grievance progressed to final and binding arbitration by an independent arbitrator.[3] Stanley H. Sergent, an arbitration umpire approved by both Defendant and the Union to hear disputes, presided over an evidentiary hearing on the grievance on June 16, 2004. Plaintiff was represented at the arbitration hearing by four Union representatives. Five witnesses testified under oath, including Plaintiff and her workers compensation attorney, Timothy Boxx.

On July 5, 2004, Arbitrator Sergent entered an opinion holding that Defendant had properly deemed Plaintiff to have "resigned without notice" under Article X of the CBA. Arb. Op. at 13. The arbitrator found the Plaintiff had not justified her failure to comply with the report-off requirement of Article X of the CBA and that her excuses were "entirely unacceptable." Arb. Op. 10, 12. He concluded that "since Goodyear properly considered the grievant as

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through contract language, plant postings, and personal communications it was made abundantly clear to the grievant that she was required to report off to her department." Arb. Op. at 12. The court is bound by this finding for the reasons discussed below.

[2] As a bargaining unit employee, Plaintiff's employment was subject to the terms of the CBA between her union and Defendant.

[3] In support of its motion, Defendant has attached a copy of the decision of the arbitrator.

having resigned without notice her grievance is without merit and must be denied." *Id.* at 12. Plaintiff did not seek to modify or vacate the arbitrator's decision.

When an issue has been "fully litigated and necessarily determined by an adjudicatory body, a party and its privies are precluded from raising that issue in a subsequent proceeding." *Central Transport, Inc. v. Four Phase Systems, Inc.*, 936 F.2d 256. 260 (6th Cir. 1991) (citing *United States v. Stauffer Chemical Co.*, 464 U.S. 165 (1984); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979)). Federal law gives estoppel effect to issues litigated in an arbitration proceeding between the same parties unless the procedures were unfair or the decision unreliable. *Ivery v. United States*, 686 F.2d 410, 413-14 (6th Cir. 1982), *cert. denied*, 460 U.S. 1037 (1983). Findings of an arbitrator bind a court when "(1) the issue is identical to one in the prior adjudication; (2) there was a final judgment on the merits; (3) the estopped party was a party ... to the prior adjudication; and (4) the estopped party was given a full and fair opportunity to be heard on the adjudicated issue." *City of Bismarck v. Toltz, King, Duvall, Anderson and Assocs., Inc.*, 855 F.2d 580, 582 (8th Cir. 1988). *C.f. Verizon North, Inc. V. Strand*, 367 F.3d 577 (6th Cir. 2004) (Collateral estoppel applies when "(1) the issue in the subsequent litigation is identical to that resolved in the earlier litigation, (2) the issue was actually litigated and decided in the prior action, (3) the resolution of the issue was necessary and essential to a judgment on the merits in the prior litigation, (4) the party to be estopped was a party to the prior litigation (or in privity with such a party), and (5) the party to be estopped had a full and

fair opportunity to litigate the issue." (citation omitted)).

In the present case, the arbitrator decided the same issue as that presented in this lawsuit, i.e., whether Plaintiff was discharged for impermissible reasons. There was a final judgment on the merits, *see Wellons, Inc. v. T.E. Ibberson Co.*, 869 F.2d 1166 (8th Cir. 1989) ("An arbitration award may constitute a final judgment for the purposes of collateral estoppel."), and Plaintiff was a party to the "prior adjudication."

Finally, there is no evidence that Plaintiff was not given a "full and fair opportunity to be heard." *See Ivery*, 686 F.2d at 413-14 (Court action was barred since there was no "suggestion that the arbitration procedures were unfair or that any statutory or contractual policies would provide an exception to the general rule favoring the finality of arbitration decisions between the same parties.") Although Plaintiff contends that the Union did not properly represent her, that claim was resolved by the National Labor Relations Board ("NLRB"). Plaintiff filed a charge with the NLRB alleging that she was not properly represented, and the NLRB found no merit to the charge. Plaintiff's remedy to challenge the NLRB's ruling was to seek judicial review of the decision in a Section 301 "hybrid" suit against the Union, but she

did not do so.[4] Therefore, Plaintiff cannot raise a claim against the Union at this juncture.

Plaintiff also claims that she was not represented by legal counsel at the hearing. It is undisputed that Plaintiff was represented at the hearing by four members of her Union. In addition, Plaintiff's workers compensation attorney was present and testified on her behalf. Furthermore, Defendant also was not represented by legal counsel. Therefore, this argument is without merit.

Plaintiff's challenge to the arbitrator's neutrality is also without merit. Arbitrator Sargent is one of eleven named impartial umpires agreed to by Defendant and the Union pursuant to Article V(b)(6)) of the CBA. Plaintiff has offered no proof of bias other than her allegation that the arbitrator has ruled more for management than for workers.

Plaintiff has also challenged the arbitrator's decision on the grounds that the arbitrator did not consider all of the issues. Plaintiff argues that she is not estopped by the prior arbitration of her grievance because her grievance "merely states that 'the union protests the unjust termination of the grievant.'"

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[4] A Section 301 hybrid suit is one in which a plaintiff alleges a breach of the CBA against her employer and a breach of the duty of fair representation against her union. *See DelCostello v. International Brotherhood of Teamsters*, 462 US.151 (1983). The Sixth Circuit has held that in order to have standing in an Labor Management Relations Act suit against an employer, an individual employee must also file a suit against her union for breach of the CBA. *See Bacashihua v. United States Postal Serv.*, 859 F.2d 402,405-06 (6th Cir. 1988).

Response at p. 19. Plaintiff relies on *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), in support of her argument. *Alexander* hold that a plaintiff whose union submits to arbitration a claim arising under a CBA's nondiscrimination clause is not precluded from later bringing discrimination claims in federal court. *Alexander* is inapposite because the matter arbitrated by Plaintiff and Defendant was not a discrimination claim. Instead, it was a contractual matter - whether Plaintiff had resigned without notice as defined by Article X of the CBA - and Plaintiff is bound by the arbitrator's decision that she did, in fact, resign.[5]

Plaintiff also claims that the arbitrator did "not discuss (her) ADA claims, nor address the issues she raised regarding unsafe working conditions." Response at p. 20. If Plaintiff believed that the arbitrator's decision was incorrect or incomplete, she could have filed an action to vacate that decision. *See Aloisi Lockheed Martin Energy Systems, Inc.*, 321 F.3d 551, 557 (6th Cir. 2003). She did not do so and cannot now complain of the decision.

Plaintiff further claims that the arbitrator's decision was deficient in that he did not consider a prior arbitration opinion. This argument fails because Article V(b)(2) states that "Awards will not be regarded as having precedent value." Furthermore, it is well established that arbitral awards are based on the individual facts and circumstances of each

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[5] Plaintiff attempts to argue that "the arbitration award is not res judicata as to the *reason* for her discharge." Response at p. 21 n. 8 (emphasis added). Because the arbitrator found that Plaintiff was not discharged, there was no *reason* for the purported discharge.

grievance and are not necessarily conclusive or binding in subsequent arbitration cases involving the same contract language but different grievances. *See W.R. Grace & Co. v. Rubber Workers Local 759*, 461 US. 757 (1983); *see also EI Dorado Technzcal Servs. v. Unzon Gen. de Trabajadores de PR.*, 961 F.2d 317, 321 (1st Cir. 1992) (denying petition to vacate subsequent award when both awards were "plausible" readings of the same contract language). Thus, previous arbitration decisions were not binding on this arbitrator, and his failure to consider a prior arbitral decision in making his ruling is irrelevant.

Accordingly, the court is bound by the arbitrator's decision that, pursuant to the terms of the CBA, Plaintiff resigned without notice from her employment instead of being terminated. Plaintiff is barred from re-litigating the issue of her alleged wrongful discharge, and Defendant is entitled to judgment as a matter of law on Plaintiff's statutory claims.

Plaintiff has also alleged that Defendant committed intentional and malicious acts constituting outrageous conduct which caused her to suffer intentional infliction of emotional distress in violation of Tennessee common law. The tort of outrageous conduct requires the plaintiff to prove that the conduct (1) was intentional or reckless; (2) was so outrageous that it is not tolerated by civilized society; and (3) resulted in serious mental injury. *Bain v. Wells*, 936 S.W.2d 618, 622 (Tenn. 1997), The plaintiff must prove these elements by an "exacting standard." *Miller v. Willbanks*, 8 S.W.3d 607, 614 (Tenn. 1999); *see also Richardson v. CVS Corp.*, 207 F. Supp. 2d 733, 746 (E.D. Tenn. 2001) (even a federal law violation, without more, does not support such a claim).

> The cases thus far decided have found liability only where the defendant's conduct has been extreme and outrageous. It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by "malice," or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous."

Bain, 936 S.W.2d at 623 (citation omitted).

Plaintiff has failed to present any evidence that Defendant's conduct was intentional, reckless, or "so outrageous that it is not tolerated by civilized society." Instead, the evidence in the record, based on the arbitrator's decision, establishes that Plaintiff voluntarily resigned her position. Consequently, this claim fails.

Finally, Plaintiff claims that Defendant breached its duty of good faith and fair dealing. Tennessee recognizes an implied duty of good faith and fair dealing in the performance and enforcement of a contract's terms such that a contracting party may not do anything to impair or destroy the other party's

rights to receive the benefits of the contract as written. *Elliott v. Elliott*, 149 S.W.3d 77, 85 (Tenn. App. 2004). The court may not add to or vary the contract's terms. *See Austa La Vista, LLC v. Mariner's Pointe Interval Owners Ass'n, Inc.*, 173 S.W.3d 786 (Tenn. App. 2005). "Performance of a contract according to its terms cannot be characterized as bad faith." *Wallace v. Nat'l Bank of Commerce*, 938 S.W.2d 684, 687 (Tenn. 1996). When an employer follows contract terms in discharging an employee, as a matter of law there is no violation of the duty of good faith and fair dealing. *See McGee v. Best*, 106 S.W.3d 48, 61, 67 (Tenn. App. 2002).

The CBA in this case contained an express provision that an employee absent from work for seven scheduled work days or more, without reporting in "shall be considered as having resigned without notice." The arbitrator found that, although Plaintiff knew the rules and had been warned, she was absent for more than seven days without reporting in. By regarding her as having resigned without notice, Defendant followed the terms of the CBA as the arbitrator found. Defendant, therefore, did not violate its duty of good faith or fair dealing. Consequently, Defendant is entitled to summary judgment on Plaintiff's state common law claims as well as her statutory claims.

Because Defendant is entitled to judgment as a matter of law, the motion for summary judgment is GRANTED. Defendant's motions in limine [DE#s 166, 167, 168, 169, 170] are DENIED as moot, and Defendant's motion to continue [DE# 176] is DENIED as moot. The clerk is directed to enter judgment accordingly.

IT IS SO ORDERED.

s/ James D. Todd
JAMES D. TODD
UNITED STATES DISTRICT JUDGE

United States District Court
WESTERN DISTRICT OF TENNESSEE
Eastern Division

CASE NUMBER: 04-1307-T/An

[Filed November 9, 2006]

MARCIA NANCE,	)
Plaintiff,	)
	)
v.	)
	)
GOODYEAR TIRE AND RUBBER CO.,	)
Defendant.	)
	)

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came to consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that in compliance with the order entered in the above-styled matter on November 9, 2006, Defendant's motion for summary judgment is GRANTED and summary judgment is hereby ENTERED against Plaintiff. Defendant's motions in limine and motion to continue are DENIED AS MOOT.

APPROVED:

s/ **James D. Todd**
JAMES D. TODD

UNITED STATES DISTRICT JUDGE

THOMAS M. GOULD
CLERK

BY: s/Emily J. Smith
DEPUTY CLERK

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 06-6563

[Filed August 14, 2008]

MARCIA B. NANCE, Plaintiff-Appellant,	)
v.	)
THE GOODYEAR TIRE & RUBBER COMPANY, Defendant-Appellee.	)

ORDER

BEFORE: BATCHELDER, MOORE, and COLE, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green
Clerk

APPENDIX D

United States Code
Title 29. Labor
Chapter 28. Family and Medical Leave
Subchapter I. General Requirements for Leave

§ 2612. Leave requirement

(a) In general

(1) Entitlement to leave

Subject to section 2613 of this title, an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period for one or more of the following:

(A) Because of the birth of a son or daughter of the employee and in order to care for such son or daughter.

(B) Because of the placement of a son or daughter with the employee for adoption or foster care.

(C) In order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition.

(D) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.

(E) Because of any qualifying exigency (as the Secretary shall, by regulation, determine) arising out of the fact that the spouse, or a son, daughter, or parent of the employee is on active duty (or has been notified of an impending call or order to active duty) in the Armed Forces in support of a contingency operation.

(2) Expiration of entitlement

The entitlement to leave under subparagraphs (A) and (B) of paragraph (1) for a birth or placement of a son or daughter shall expire at the end of the 12-month period beginning on the date of such birth or placement.

(3) Servicemember family leave

Subject to section 2613 of this title, an eligible employee who is the spouse, son, daughter, parent, or next of kin of a covered servicemember shall be entitled to a total of 26 workweeks of leave during a 12-month period to care for the servicemember. The leave described in this paragraph shall only be available during a single 12-month period.

(4) Combined leave total

During the single 12-month period described in paragraph (3), an eligible employee shall be entitled to a combined total of 26 workweeks of leave under paragraphs (1) and (3). Nothing in this

paragraph shall be construed to limit the availability of leave under paragraph (1) during any other 12-month period.

(b) Leave taken intermittently or on reduced leave schedule

(1) In general

Leave under subparagraph (A) or (B) of subsection (a)(1) of this section shall not be taken by an employee intermittently or on a reduced leave schedule unless the employee and the employer of the employee agree otherwise. Subject to paragraph (2), subsection (e)(2) of this section, and subsection (b)(5) or (f) (as appropriate) of section 2613 of this of this title, leave under subparagraph (C) or (D) of subsection (a)(1) of this section or under subsection (a)(3) of this section may be taken intermittently or on a reduced leave schedule when medically necessary. Subject to subsection (e)(3) of this section and section 2613(f) of this title, leave under subsection (a)(1)(E) of this section may be taken intermittently or on a reduced leave schedule. The taking of leave intermittently or on a reduced leave schedule pursuant to this paragraph shall not result in a reduction in the total amount of leave to which the employee is entitled under subsection (a) of this section beyond the amount of leave actually taken.

(2) Alternative position

If an employee requests intermittent leave, or leave on a reduced leave schedule, under subparagraph (C) or (D) of subsection (a)(1) of this section or

under subsection (a)(3) of this section, that is foreseeable based on planned medical treatment, the employer may require such employee to transfer temporarily to an available alternative position offered by the employer for which the employee is qualified and that--

(A) has equivalent pay and benefits; and

(B) better accommodates recurring periods of leave than the regular employment position of the employee.

(c) Unpaid leave permitted

Except as provided in subsection (d) of this section, leave granted under subsection (a) may consist of unpaid leave. Where an employee is otherwise exempt under regulations issued by the Secretary pursuant to section 213(a)(1) of this title, the compliance of an employer with this subchapter by providing unpaid leave shall not affect the exempt status of the employee under such section.

(d) Relationship to paid leave

(1) Unpaid leave

If an employer provides paid leave for fewer than 12 workweeks (or 26 workweeks in the case of leave provided under subsection (a)(3) of this section), the additional weeks of leave necessary to attain the 12 workweeks (or 26 workweeks, as appropriate) of leave required under this subchapter may be provided without compensation.

(2) Substitution of paid leave

(A) In general

An eligible employee may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal leave, or family leave of the employee for leave provided under subparagraph (A), (B), (C), or (E) of subsection (a)(1) of this section for any part of the 12-week period of such leave under such subsection.

(B) Serious health condition

An eligible employee may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal leave, or medical or sick leave of the employee for leave provided under subparagraph (C) or (D) of subsection (a)(1) of this section for any part of the 12-week period of such leave under such subsection, except that nothing in this subchapter shall require an employer to provide paid sick leave or paid medical leave in any situation in which such employer would not normally provide any such paid leave. An eligible employee may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal leave, family leave, or medical or sick leave of the employee for leave provided under subsection (a)(3) of this section for any part of the 26-week period of such leave under such subsection, except that nothing in this subchapter requires an employer to provide paid sick leave or paid

medical leave in any situation in which the employer would not normally provide any such paid leave.

(e) Foreseeable leave

(1) Requirement of notice

In any case in which the necessity for leave under subparagraph (A) or (B) of subsection (a)(1) of this section is foreseeable based on an expected birth or placement, the employee shall provide the employer with not less than 30 days' notice, before the date the leave is to begin, of the employee's intention to take leave under such subparagraph, except that if the date of the birth or placement requires leave to begin in less than 30 days, the employee shall provide such notice as is practicable.

(2) Duties of employee

In any case in which the necessity for leave under subparagraph (C) or (D) of subsection (a)(1) of this section or under subsection (a)(3) of this section is foreseeable based on planned medical treatment, the employee--

(A) shall make a reasonable effort to schedule the treatment so as not to disrupt unduly the operations of the employer, subject to the approval of the health care provider of the employee or the health care provider of the son, daughter, spouse, or parent of the employee, as appropriate; and

(B) shall provide the employer with not less than 30 days' notice, before the date the leave is to begin, of the employee's intention to take leave under such subparagraph, except that if the date of the treatment requires leave to begin in less than 30 days, the employee shall provide such notice as is practicable.

(3) Notice for leave due to active duty of family member

In any case in which the necessity for leave under subsection (a)(1)(E) of this section is foreseeable, whether because the spouse, or a son, daughter, or parent, of the employee is on active duty, or because of notification of an impending call or order to active duty in support of a contingency operation, the employee shall provide such notice to the employer as is reasonable and practicable.

(f) Spouses employed by same employer

(1) In general

In any case in which a husband and wife entitled to leave under subsection (a) of this section are employed by the same employer, the aggregate number of workweeks of leave to which both may be entitled may be limited to 12 workweeks during any 12-month period, if such leave is taken--

(A) under subparagraph (A) or (B) of subsection (a)(1) of this section; or

(B) to care for a sick parent under subparagraph (C) of such subsection.

(2) Servicemember family leave

(A) In general

The aggregate number of workweeks of leave to which both that husband and wife may be entitled under subsection (a) of this section may be limited to 26 workweeks during the single 12-month period described in subsection (a)(3) of this section if the leave is--

(i) leave under subsection (a)(3) of this section; or

(ii) a combination of leave under subsection (a)(3) of this section and leave described in paragraph (1).

(B) Both limitations applicable

If the leave taken by the husband and wife includes leave described in paragraph (1), the limitation in paragraph (1) shall apply to the leave described in paragraph (1).

United States Code
Title 42. The Public Health and Welfare
Chapter 126. Equal Opportunity for Individuals with Disabilities
Subchapter I. Employment

§ 12112. Discrimination

(a) General rule

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(b) Construction

As used in subsection (a) of this section, the term "discriminate" includes--

(1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;

(2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this subchapter (such relationship includes a relationship with an employment or referral agency, labor union, an organization

providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs);

(3) utilizing standards, criteria, or methods of administration--

(A) that have the effect of discrimination on the basis of disability; or

(B) that perpetuate the discrimination of others who are subject to common administrative control;

(4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association;

(5) (A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or

(B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;

(6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity; and

(7) failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

(c) Covered entities in foreign countries

(1) In general

It shall not be unlawful under this section for a covered entity to take any action that constitutes discrimination under this section with respect to an employee in a workplace in a foreign country if compliance with this section would cause such covered entity to violate the law of the foreign country in which such workplace is located.

(2) Control of corporation

(A) Presumption

If an employer controls a corporation whose place of incorporation is a foreign country, any practice that constitutes discrimination under this section and is engaged in by such corporation shall be presumed to be engaged in by such employer.

(B) Exception

This section shall not apply with respect to the foreign operations of an employer that is a foreign person not controlled by an American employer.

(C) Determination

For purposes of this paragraph, the determination of whether an employer controls a corporation shall be based on--

(i) the interrelation of operations;

(ii) the common management;

(iii) the centralized control of labor relations; and

(iv) the common ownership or financial control,

of the employer and the corporation.

(d) Medical examinations and inquiries

(1) In general

The prohibition against discrimination as referred to in subsection (a) of this section shall include medical examinations and inquiries.

(2) Preemployment

(A) Prohibited examination or inquiry

Except as provided in paragraph (3), a covered entity shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability.

(B) Acceptable inquiry

A covered entity may make preemployment inquiries into the ability of an applicant to perform job-related functions.

(3) Employment entrance examination

A covered entity may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the results of such examination, if--

(A) all entering employees are subjected to such an examination regardless of disability;

(B) information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record, except that--

(i) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;

(ii) first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and

(iii) government officials investigating compliance with this chapter shall be provided relevant information on request; and

(C) the results of such examination are used only in accordance with this subchapter.

(4) Examination and inquiry

(A) Prohibited examinations and inquiries

A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.

(B) Acceptable examinations and inquiries

A covered entity may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that work site. A covered entity may make inquiries into the ability of an employee to perform job-related functions.

(C) Requirement

Information obtained under subparagraph (B) regarding the medical condition or history of any employee are subject to the requirements of subparagraphs (B) and (C) of paragraph (3).

West's Tennessee Code Annotated
Title 50. Employer and Employee
Chapter 6. Workers' Compensation
Part 1. General Provisions

§ 50-6-102. Definitions

As used in this chapter, unless the context otherwise requires:

(1) "Administrator" means the chief administrative officer of the division of workers' compensation of the department of labor and workforce development;

(2) "AMA Guides" means the 6th edition of the *American Medical Association Guides to the Evaluation of Permanent Impairment,* American Medical Association, until a new edition is designated by the general assembly in accordance with § 50-6-204(d)(3)(C). The edition that is in effect on the date the employee is injured is the edition that shall be applicable to the claim;

(3)(A) "Average weekly wages" means the earnings of the injured employee in the employment in which the injured employee was working at the time of the injury during the period of fifty-two (52) weeks immediately preceding the date of the injury divided by fifty-two (52); but if the injured employee lost more than seven (7) days during the period when the injured employee did not work, although not in the same week, then the earnings for the remainder of the fifty-two (52) weeks shall be divided by the number of weeks remaining after the time so lost has been deducted;

(B) Where the employment prior to the injury extended over a period of less than fifty-two (52) weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages shall be followed; provided, that results just and fair to both parties will thereby be obtained;

(C) Where, by reason of the shortness of the time during which the employee has been in the employment of the employee's employer, it is impracticable to compute the average weekly wages as defined in this subdivision (3) regard shall be had to the average weekly amount that, during the first fifty-two (52) weeks prior to the injury or death, was being earned by a person in the same grade, employed at the same work by the same employer, and if there is no such person so employed, by a person in the same grade employed in the same class of employment in the same district;

(D) Wherever allowances of any character made to any employee in lieu of wages are specified as part of the wage contract, they shall be deemed a part of such employee's earnings;

(4) "Benefit review conference" means a nonadversarial, informal dispute resolution proceeding to mediate and resolve workers' compensation disputes as provided in this chapter;

(5) "Case management" means medical case management or the ongoing coordination of medical care services provided to an injured or disabled

employee on all cases where medical care expenses are expected to exceed a threshold;

(6) "Commissioner" means the commissioner of labor and workforce development;

(7) "Construction design professional" means:

(A) Any person possessing a valid registration or license entitling that person to practice the technical profession of architecture, engineering, landscape architecture or land surveying in Tennessee;

(B) Any corporation, partnership, firm or other legal entity authorized by law to engage in the practice of any such technical profession in Tennessee; or

(C) Any person, firm or corporation providing interior space planning or design in Tennessee;

(8) "Department" means the department of labor and workforce development;

(9) "Division" or "division of workers' compensation" means the division of workers' compensation of the department of labor and workforce development;

(10)(A) "Employee" includes every person, including a minor, whether lawfully or unlawfully employed, the president, any vice president, secretary, treasurer or other executive officer of a corporate employer without regard to the nature of the duties of such corporate officials, in the service of an employer, as employer is defined in subdivision (12), under any contract of hire

or apprenticeship, written or implied. Any reference in this chapter to an employee who has been injured shall, where the employee is dead, also include the employee's legal representatives, dependents and other persons to whom compensation may be payable under the Workers' Compensation Law, compiled in this chapter;

(B) "Employee" also includes a sole proprietor or a partner who devotes full time to the proprietorship or partnership and elects to be included in the definition of "employee" by filing written notice thereof with the division at least thirty (30) days before the occurrence of any injury or death, and may at any time withdraw the acceptance by giving notice of the withdrawal to the division;

(C) The provisions of this subdivision (10), allowing a sole proprietor or a partner to elect to come under the provisions of the Workers' Compensation Law, compiled in this chapter, shall not be construed to deny coverage of such sole proprietor or partner under any individual or group accident and sickness policy the sole proprietor or partner may have in effect, in cases where such sole proprietor or partner has elected not to be covered by the provisions of the Workers' Compensation Law, for injuries sustained by such sole proprietor or partner that would have been covered by the provisions of the Workers' Compensation Law had such election been made, notwithstanding any provision of the accident and sickness policy to the contrary. Nothing in this section shall require coverage of occupational injuries or sicknesses, if such are not covered under the terms of the policy

without reference to eligibility for workers' compensation benefits;

(11) In a work relationship, in order to determine whether an individual is an "employee," or whether an individual is a "subcontractor" or an "independent contractor," the following factors shall be considered:

(A) The right to control the conduct of the work;

(B) The right of termination;

(C) The method of payment;

(D) The freedom to select and hire helpers;

(E) The furnishings of tools and equipment;

(F) Self scheduling of working hours; and

(G) The freedom to offer services to other entities;

(12) "Employer" includes any individual, firm, association or corporation, or the receiver, or trustee of the same, or the legal representative of a deceased employer, using the services of not less than five (5) persons for pay, except as provided in § 50-6-113, and, in the case of an employer engaged in the mining and production of coal, one (1) employee for pay. If the employer is insured, it shall include the employer's insurer, unless otherwise provided in this chapter;

(13) "Injury" and "personal injury" mean an injury by accident arising out of and in the course of employment that causes either disablement or death of the employee and shall include occupational

diseases arising out of and in the course of employment that cause either disablement or death of the employee and shall include a mental injury arising out of and in the course of employment;

(14) "Maximum total benefit" means the sum of all weekly benefits to which a worker may be entitled; and

(A) For injuries occurring between July 1, 1990, and June 30, 1991, the maximum total benefit shall be one hundred nine thousand two hundred dollars ($109,200);

(B) For injuries occurring on or after July 1, 1991, and before August 1, 1992, the maximum total benefit shall be one hundred seventeen thousand six hundred dollars ($117,600); and

(C) For injuries occurring on or after July 1, 1992, the maximum total benefit shall be four hundred (400) weeks times the maximum weekly benefit except in instances of permanent total disability;

(15)(A) "Maximum weekly benefit" means the maximum compensation payable to the worker per week; and

(i) For injuries occurring between July 1, 1990, and June 30, 1991, the maximum weekly benefit shall be two hundred seventy-three dollars ($273) per week;

(ii) For injuries occurring on or after July 1, 1991, and before August 1, 1992, the maximum weekly benefit shall be two hundred ninety-four dollars ($294) per week;

(iii) For injuries occurring on or after August 1, 1992, through June 30, 1993, the maximum weekly benefit shall be sixty-six and two-thirds percent (66 2/3 %) of the employee's average weekly wage up to seventy-eight percent (78%) of the state's average weekly wage, as determined by the division;

(iv) For injuries occurring on or after July 1, 1993, through June 30, 1994, the maximum weekly benefit shall be sixty-six and two-thirds percent (66 2/3 %) of the employee's average weekly wage up to eighty-two and four-tenths percent (82.4%) of the state's average weekly wage, as determined by the department;

(v) For injuries occurring on or after July 1, 1994, through June 30, 1995, the maximum weekly benefit shall be sixty-six and two-thirds percent (66 2/3 %) of the employee's average weekly wage up to eighty-six and eight-tenths percent (86.8%) of the state's average weekly wage, as determined by the department;

(vi) For injuries occurring on or after July 1, 1995, through June 30, 1996, the maximum weekly benefit shall be sixty-six and two-thirds percent (66 2/3 %) of the employee's average weekly wage up to ninety-one and two-tenths percent (91.2%) of the state's average weekly wage, as determined by the department;

(vii) For injuries occurring on or after July 1, 1996, through June 30, 1997, the maximum weekly benefit shall be sixty-six and two-thirds percent (66 2/3 %) of the employee's average

weekly wage up to ninety-five and six-tenths percent (95.6%) of the state's average weekly wage as determined by the department;

(viii) For injuries occurring on or after July 1, 1997, through June 30, 2004, the maximum weekly benefit shall be sixty-six and two-thirds percent (66 2/3 %) of the employee's average weekly wage up to one hundred percent (100%) of the state's average weekly wage as determined by the division;

(ix) For injuries occurring on or after July 1, 2004, the maximum weekly benefit for permanent disability benefits shall be sixty-six and two-thirds percent (66 2/3 %) of the employee's average weekly wage up to one hundred percent (100%) of the state's average weekly wage, as determined by the department; and

(x) (*a*) For injuries occurring on or after July 1, 2004, through June 30, 2005, the maximum weekly benefit for temporary disability benefits shall be sixty-six and two-thirds percent (66 2/3 %) of the employee's average weekly wage up to one hundred five percent (105%) of the state's average weekly wage, as determined by the department; and

(*b*) For injuries occurring on or after July 1, 2005, the maximum weekly benefit for temporary disability benefits shall be sixty-six and two-thirds percent (66 2/3 %) of the employee's average weekly wage up to one hundred ten percent (110%) of the

state's average weekly wage, as determined by the department.

(B) As used in this subdivision (15), the state average weekly wage shall be determined as of the preceding January 1, and shall be adjusted annually using the data from the division and shall be effective on July 1 of each year;

(16) "Mental injury" means a loss of mental faculties or a mental or behavioral disorder where the proximate cause is a compensable physical injury resulting in a permanent disability, or an identifiable work-related event resulting in a sudden or unusual mental stimulus. A mental injury shall not include a psychological or psychiatric response due to the loss of employment or employment opportunities;

(17) "Minimum weekly benefit" means the minimum compensation per week payable to the worker;

(A) For injuries occurring between July 1, 1985, and June 30, 1986, the minimum weekly benefit shall be twenty dollars ($20.00) per week;

(B) For injuries occurring between July 1, 1986, and June 30, 1987, the minimum weekly benefit shall be twenty-five dollars ($25.00) per week;

(C) For injuries occurring between July 1, 1987, and June 30, 1988, the minimum weekly benefit shall be thirty dollars ($30.00) per week;

(D) For injuries occurring on or after July 1, 1988, and before July 1, 1993, the minimum weekly

benefit shall be thirty-five dollars ($35.00) per week; and

(E) For injuries occurring on or after July 1, 1993, the minimum weekly benefit shall be fifteen percent (15%) of the state's average weekly wage, as determined by the division;

(18) "Utilization review" means evaluation of the necessity, appropriateness, efficiency and quality of medical care services provided to an injured or disabled employee based on medically accepted standards and an objective evaluation of the medical care services provided; provided, that "utilization review" does not include the establishment of approved payment levels or a review of medical charges or fees; and

(19) "Workers' compensation specialist" or "specialist" means a department employee who provides information and communication services regarding workers' compensation for employees and employers, and who conducts benefit review conferences and performs other duties as provided in this chapter.

Federal Rules of Evidence
Rule 801

The following definitions apply under this article:

(a) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) Declarant. A "declarant" is a person who makes a statement.

(c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) Statements which are not hearsay. A statement is not hearsay if–

> **(1) Prior statement by witness.** The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person; or
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> **(2) Admission by party-opponent.** The statement is offered against a party and is (A) the

party's own statement, in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy. The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).